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No. 96-663

Supreme Court, U.S.  
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*In the*  
**Supreme Court of the United States**  
October Term, 1996

MARVIN KLEHR AND MARY KLEHR

*Petitioners,*

v.

A.O. SMITH CORPORATION AND  
A.O. SMITH HARVESTORE PRODUCTS, INC.,

*Respondents.*

ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX - VOLUME II

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

CIVIL DIVISION

PROPERTY DAMAGE

---

Marvin Klehr and Mary Klehr,

Plaintiffs,

vs.

File No. 91-08583

A.O. Smith Harvestore Products,  
Inc., A.O. Smith Corporation,  
MVBA Harvestore Systems, Minnesota  
Valley Breeders Co-op, Mid West  
Breeders Co-op, and 21st Century  
Genetics Co-op,

Defendants.

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VIDEOTAPED DEPOSITION OF  
MARY KLEHR

FEBRUARY 10, 1993

\* \* \*

[p. 34] your husband or was the discussion more between



your husband and Mr. Deutsch?

A. Well, probably more between Marvin and Dick Deutsch. But I was there and I asked questions and I was in on it.

Q. Okay. Tell me what specifically you can recall Mr. Deutsch telling you about the Harvestore silo.

A. Well, I guess one thing that sticks out in my mind is the idea that no oxygen got in contact with the feed and, therefore, you would have better feed, better, healthier cows, more production and more [p.35] money.

Q. Did Mr. Deutsch tell you why you could expect to have better feed from a Harvestore silo?

A. Can you say that again?

Q. Sure. Did he explain to you why the Harvestore silo would give you better feed?

A. I guess because air didn't come in contact with the feed; therefore, you would have better feed.

Q. Did he tell you why you could expect to have healthier cows?

A. Well, because if the feed is better, naturally you're going to have healthier cows.

Q. And is that also why he told you you could expect to have more production from your cows?

A. [p. 36] Yes.

Q. Do you remember anything else that he told you about the Harvestore silo?

A. I'm sure there were a lot of things, but -- I guess I can't remember.

Q. You mentioned that you went on some farm tours. How many farm tours did you attend?

A. Well, we went out one day and we went to three different farms.

Q. Do you remember whose farms you visited?

A. I can only remember the name of one.

Q. Okay. Who was that?

A. That was Bob Leiffeld.

Q. Do you know how to spell his name?

A. Oh. No, I don't.

Q. Was he a farmer in the area around Jordan?

A. This was down by Miesville.

Q. Do you remember the names of the other two farms that you went to?

A. Not the names, no.

Q. How did you get to these farms?

A. Dick Deutsch took us.

Q. Did he take you in his car?

A. Yes.

Q. What did you do when you got to the farms?

\* \* \*

[p. 104] involvement whatsoever.

A. No. I guess I really don't have any involvement in the milking and feeding end of it.

Q. Okay. You also discussed earlier this morning about financial problems in or around 1977. And I recall or noted that you did not recall when those financial problems started. Is there a point in time that you could identify for when those financial problems eased or abated?

A. Can I make a change on something?

Q. Sure.

A. From that date of 1977, thinking about it later, it was probably the early '80s I did the bookkeeping up till.

Q. Okay.

A. So say '82. I've got, you know, the records and farm books at home will have my handwriting in them.

Q. We can tell from your entries when you stopped making those entries.

A. Right.

Q. Okay. But that doesn't change the 1977 year for what you identified as --

A. Well, that's basically, the 1982 date would probably be basically, that's when I quit doing the [p. 105] books because of financial reasons.

Q. Is it that the financial problems extended from about 1977 to 1982 or beyond or shall we disregard the 1977 reference this morning and now look at 1982?

A. Correct. Disregard the '77 and go to the '82.

Q. Okay. Well, apparently your memory is a little bit refreshed on that. Can you identify when those financial problems started?

A. I'd say within a year of the time I quit doing the books. If I quit in '82, they probably were right around '81.

Q. And do you recall any specific event that is the kind of the standard or the point in time that commenced that period? A loss in number of cows? I'm just trying to find any sort of reference in your memory that marks that time period for you.

A. Well, like I said, we were, financially it was tough. And I suppose the bottom line was the money wasn't there, so production had to be down.

Q. And I'm not trying to put words in your mouth or anything like that, but sometimes one can identify, say, a drought or, you know, a disease in the crops or something saying that's what the watershed was or the precipitant of that was for a particular [p.106] chain of events. Is there anything like that in your mind for the financial problems that you're talking about?

A. No.

Q. And then to kind of pick up where I started, is there any point in time when you feel the financial problems eased or abated after 1982?

A. Well, they've gotten somewhat better the last year or two.

Q. 1991, 1992?

A. Yes.

Q. So then is it fair to say that up until '91 or '92 there was about a ten-year period, approximately, of financial difficulties--

A. Yes.

Q. -- for your family farm?

A. Yes.

Q. And can you describe how that has impacted on you and in your family's life-style and the farm itself?

A. Well, it's made a big impact. I went out to work in 1985 for that reason. Well, needless to say, my husband and I did a lot of arguing over financial stress. And, of course, I quit doing the books and, actually I took a disinterest in anything that

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[p. 1]

STATE OF MINNESOTA

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PROPERTY DAMAGE

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A.O. Smith Harvestore Products,  
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Valley Breeders Co-op, Mid West  
Breeders Co-op, and 21st Century  
Genetics Co-op,

Defendants.

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VIDEOTAPED DEPOSITION OF  
MARVIN KLEHR

FEBRUARY 10, 1993

...

A. [p. 6] Okay.

Q. How old are you now?

A. Forty-eight.

Q. And I think we got the information from your wife about your children. Did she say anything, did she get any names wrong with your kids?

A. No.

Q. How long have you been living on the farm where you're living now?

A. All my life.

Q. With the exception, I gather --

A. The one year that we were married I was gone.

Q. Okay. There was one year when you were in an apartment in Shakopee.

A. Yes.

Q. And that was in 1968?

A. Yes.

Q. And with the exception of that, you've been living on the farm all your life.

A. Yes.

Q. Did you complete high school?

A. No, I didn't.

Q. Okay. How many years of high school or schooling did you have?

A. I went through the tenth grade.

\* \* \*

A. [p. 15] No, not right offhand.

Q. Tell me as best you can recall what property you and your brother bought from your father. What was there in the personal property that you bought? Was it a huge long list of things?

A. Yes. It was 45 cows and, I imagine, 45 head of young stock. We bought the chickens, probably 250 chickens. Maybe 30 sows. Just guessing, maybe 200 pigs. And then all the machinery, the machinery that was there.

Q. What sorts of feed storage structures or devices did you have on the farm at that time?

A. There was a 17 by 40 Harvestore. We have a 16 by 40 clay block silo, a red clay block silo, and a 12 by 40 cement stave.

Q. How big was the cement stave?

A. Twelve by 40.

Q. And did you have any grain bins or anything like that?

A. There was one. There was one 3,200 bushel grain bin. And the granary.

Q. When you bought the personal property from your father did you buy the Harvestore silo from him? Was that included in the personal property you bought?

\* \* \*

[p. 21] silage from 1969 to 1973?

A. In about, I'd say maybe '72 we switched, went to high moisture corn. Maybe even '71. '71 or '72 we switched to high moisture corn in the 17 by 40 Harvestore.

Q. Why did you switch to high moisture corn at that time?

A. We were picking cob corn before then. We used to have the corn cribs full. The lawn was full of corn cribs all over, so we decided we were going to put it someplace under a roof.

Q. When you switched to high moisture shell corn in '71 or '72, how many years did you store high moisture shell corn in the Harvestore?

A. Up to now.

Q. Pardon me? Up till now?

A. Up to now.

Q. So since 1971 or '72 you have stored high moisture shell corn in the 17 by 40?

A. Yes.

Q. Have you stored anything else other than high moisture shell corn in the 17 by 40 since that time?

A. No.

Q. Are you still using the 17 by 40 today?

A. [p. 22] Yes.

Q. And I gather from what you just said you're still storing high moisture shell corn in the silo?

A. Yes.

Q. And what are you using that feed for now?

A. For the milk cows.

Q. Are you feeding that to your dairy cows?

A. Yes.

Q. Back in -- well, let's back up from 1969 till -- during the time you were feeding corn silage from the 17 by 40, how did you use that corn silage? What animals were you feeding with it?

A. I would say the whole farm at the time we were feeding out of it.

Q. Were you feeding it to the hogs and the dairy cows?

A. The hogs didn't get any, but the young stock got it.

Q. So you were feeding it to the young stock and the dairy cows?

A. Yes.

Q. But the hogs didn't get any of that.

A. (Witness shook head.)

Q. When you switched to high moisture shell corn in 1971 or 1972 which animals were fed the high moisture shelled corn from the 17 by 40?

\* \* \*

[p. 39] have credit with them or did you pay them off?

A. My wife has a checking account with Valley Bank. Norwest Bank is not in Jordan no more.

Q. So they're not carrying that; you don't have a loan with them anymore, is that right?

A. No.

Q. Did you pay them off at some point?

A. We went to First National Bank of Le Center in, very possibly '88, 1988.

Q. And when you went to First Bank of Le Center did you pay off Norwest Bank?

A. Yes. Everything was paid off through Norwest Bank.



Q. Are you still carrying a loan with Prudential?

A. Yes.

Q. That's just for the land?

A. Yes.

Q. Back when you bought the farm from your father in February 1974, what sort of plans did you have for the farm operation?

A. I believe expansion was in the planning.

Q. What sort of plans did you have for expansion at that time?

A. Well, we were -- I was planning on making the dairy herd size bigger.

Q. [p. 40] Do you recall what your plans were at that point in time in terms of the size of the dairy herd you wanted to achieve?

A. Well, we were talking of probably 90 to a hundred cows.

Q. Did you have any other sort of plans at that time for the farm operation?

A. Well, we were planning on installing or looking into a silo of some kind to store this feed.

Q. At that time in February of '74 did you have in mind what kind of a silo you wanted to buy?

A. No. I believe at that moment or at that time I did not know yet what I wanted.

Q. Did you have any sort of plans for the hog operation that you were still working on at that time?

A. No. The hog operation was a stable thing.

Q. I guess I should ask you this: After you bought your brother Tom out -- I understand Tom was the one who had been working with the hogs during that time you were in partnership. After he left did you continue to maintain the hog operation?

A. Yes. I was in charge of the hog operation. Yes.

Q. What was the size of the hog operation in February of 1974? Do you recall?

\* \* \*

[p. 54] got a 16 by 40 red silo.

A. Yes.

Q. And that's the red clay silo we already talked about, correct?

A. Yup.

Q. What year was that built on the farm, do you know?

A. The early '50s.

Q. And then just to the south of that you've got a 17 by 40 foot silo.

A. Harvestore.

Q. Oh, that's the 1955 Harvestore.

A. Yes.

Q. And then all along the, running north and south along, next to the silos you've got the cow barn.

A. Yes.

Q. And it looks like the cow barn may have been built in two segments, is that correct?

A. That's right.

Q. Which part was built first?

A. The northern part. Yes.

Q. When was that built?

A. 1948.

Q. What are the dimensions of the, the original dimensions of this cow barn?

A. Thirty-six by 90.

\* \* \*

[p. 113] asking him his knowledge then or his knowledge now?

MR. SHEPARD: Yeah. Then.

MR. BIRD: If you can recall.

THE WITNESS: Repeat that question.

BY MR. SHEPARD.

Q. I'm just trying to get a sense, when you used the stave silo did you understand that one of the things you were doing was reducing the access of oxygen to the feedstack in the silo?

A. No I guess I didn't understand that.

Q. What was your understanding of the effect of oxygen on feed?

A. What I knew then, at that time?

Q. Yeah.

A. I knew very little about oxygen and feed at that time.

Q. What about before 1974? You had been, up till 1974 you had been working on the farm for how many years?

A. I was 30 years old then.

Q. You had been on the farm all your life?

A. Except for one year when I was married.

Q. And you had been working, storing feed all those years, is that right?

A. [ p. 114] Yes.

Q. Did you understand that the access of oxygen could cause feed to spoil?

A. Yes I'd say at that point I had a vague idea that that's what it would do.

Q. Did you understand that the access of oxygen could cause mold?

A. Yes, I believe I had an idea that it would do that.

Q. Did you understand that oxygen could -- did you have any understanding of the effects of oxygen on the nutritional value of the feed?

MR. BIRD: What year are you talking about now?

MR. SHEPARD: Talking about before 1974.

MR. BIRD: At any time before 1974.

BY MR. SHEPARD:

Q. Uh-huh. Yes.

A. I guess I would have to say that I had read things about oxygen and feed, yes. I had read a few things.

Q. And what was your understanding of the effects of excessive amounts of oxygen on feed?

A. That when oxygen came in contact with feed that [p. 115] there would be some spoilage.

Q. What did you understand about how the use of the cement stave silo reduced spoilage in the corn silage?

MR. BIRD: Objection. That assumes that he had an understanding, so I don't think there is any foundation. You can go ahead and answer it, if you feel you can.

THE WITNESS: Repeat the question.

BY MR. SHEPARD:

Q. Okay. I thought you testified earlier that one of the reasons you put the corn silage in the stave silo was to reduce spoilage.

A. To do what?

Q. To reduce spoilage.

A. No. We put it in there because that was the only, that was one of the silos we had.

Q. Did you understand that one of the reasons for putting the corn silage in the stave silo was to reduce spoilage?

A. I'd have to say vaguely that the -- you'll have to repeat the question.



Q. I'm just trying to get a sense, did you understand that one of the benefits of using a stave silo to store corn silage was to reduce spoilage in the [p. 116] feed?

A. No. I could use any silo. I mean, we had the clay block one too. Didn't have to be just the cement one.

Q. Well, I mean, did you understand -- was there ever a time when you just stored corn silage in a pile on the ground?

A. We've done that a few years, yes.

Q. How did you do that?

A. Elevated it to a pile and tried to compact it around, compact it, walked on top of it, packed it down and feed some off it.

Q. What was the purpose of packing it down?

A. I guess to make the pile look nice and to keep the oxygen or air from getting in there.

Q. And what was the reason you wanted to keep air from getting in there?

A. I guess because of the spoilage. The tighter you had it compacted, the better the feed would be, the longer it would last.

Q. And you understood that the better you were able to reduce the amount of oxygen to the feed, the less chances there would be that you'd have spoilage.

A. Yes.

Q. When you stored the corn silage in the piles that [p. 117] you were talking about, what would happen, what did the feed on the very outside of the pile look like? What would happen to the feed on the outside of the pile?

A. We'd get some mold across the top.

Q. And what did you do with that feed on the outside of the pile?

A. We usually threw it away.

Q. And why did you throw it away?

A. Because we felt that it didn't belong to the animals, that they'd probably get sick from it.

Q. How many years did you store the corn silage in piles like that?

A. Two or three years.

Q. Do you remember when that was?

A. I have no idea.

Q. Sometime before 1974?

A. Oh, yeah. I was quite small when my dad used to do that.

Q. Was the use of those feed piles something that you ever did after 1969 when you were on the farm?



A. I cannot recall.

Q. Was there a reason that you didn't store feed that way after 1969?

A. I believe we had enough silage space at that time [p. 118] that we didn't have to put it out there.

Q. Was there a reason that you preferred to put your corn silage in one of the silos rather than storing it in a pile on the ground?

A. Convenience and to stop spoilage.

Q. So you had less spoilage in the stave silo than you did in the piles on the ground?

A. Oh, yes.

Q. And is that because there was less opportunity for oxygen to have access to that feed?

MR. BIRD: If you know.

THE WITNESS: I couldn't answer that.

BY MR. SHEPARD:

Q. Before 1974 when you were storing corn silage in the stave silo was there ever a time when you saw any sort of mold or spoilage on the top of the feed?

A. Yes, we did see some.

Q. When would you see the mold or the spoilage on the top?

A. Well, our program then was we fed the cement stave silo first in the fall. The red silo was tarped, filled and then we put a tarp over it. And then in the spring we would open that silo up and start feeding out of that red silo when the other one was [p. 119] empty. And when we removed the tarp there was some spoilage, some spoilage.

Q. Why did you put a tarp over the top of it?

A. Well, we heard at the time that that would prevent some of the spoilage.

Q. You understood that the spoilage on the top of the red clay silo was from the access of oxygen to that top layer?

A. Yes.

Q. And how was the quality of the feed -- strike that. What did you do with that top layer of feed when you began feeding out of the red clay silo?

A. We threw it down the chute and it was all hauled out into the field.

Q. How much would you take off the top and throw out?

A. It would vary. Maybe a foot, maybe some years two feet. I'd like to ask for a break, if possible.

Q. Sure. Let's take a short break.

(Brief recess.)

BY MR. SHEPARD:

Q. Mr. Klehr, when you talk about the feed, the corn silage that you threw out from the top of the red clay stave silo, can you just tell me what that feed looked like that you threw out?

A. It was moldy and very black and mushy.

\*\*\*

A. [p. 123] Yes.

Q. And it had that same pickled smell?

A. Yes.

Q. And was that generally true, what you've just described, each year from 1971 until the present?

A. Yes.

Q. What was your understanding of how the feed at the very end of the fill was becoming moldy?

MR. BIRD: Understanding when? That he learned over the years?

BY MR. SHEPARD:

Q. Yeah.

A. I believe that maybe at the end there was a little oxygen getting in or something that created the mold a little bit.

Q. What was your understanding as to how the oxygen was getting into the corn at the end of the feedstack?

A. I would have to believe through the unloader. It's the only thing that it could get in.

Q. And was that something you -- well, let me strike that. Did you understand, before 1974 did you have any understanding of -- well, strike that. What was your understanding before 1974 of the relationship between feed quality and animal [p. 124] performance?

A. Well, I knew that good feed made healthy animals.

Q. And what was your understanding of the effect of feeding bad feed to your dairy animals?

A. Before what year?

Q. Before 1974.

A. What I know now or what I knew then?

Q. What you knew at the time.

A. I guess I knew very little at the time. We never fed bad feed to the cows before then.

Q. And instead when you saw bad feed you would throw it out and not feed it to the animals?

A. Yes.

Q. Why did you do that?

A. I don't know. It was just a policy that we've always -- my dad, I guess, it was just the way I was brought up.

Q. Well, would it be fair to say that you were concerned that feeding that kind of feed would not be good for the animals?

A. Yes, I guess that would be fair to say.

Q. Were you involved at all in the purchase of that 1955 silo, the 17 by 40?

A. I was 11 years old. I don't believe my dad asked me too much at that time.

\*\*\*

Q. [p. 131] Well, were you aware of any kind of valve up there?

A. Well, I knew the breather bag had to have somebody up on top of the roof, some vent or some outlet.

Q. What was your understanding of the vent or the valve -- well, let me ask you this: Were you aware of a valve on top of the 17 by 40?

A. That went to the breather bag? Yes.

Q. Okay. What was your understanding of the way the valve worked that was on the 17 by 40?

A. That air passed through that valve and went into the breather bag, in and out.

Q. Other than your DHIA records, are you aware of any farm records that would show how many cows you had in your dairy herd at any point in time, say, before 1976?

A. DHIA records I would believe would be the only ones.

Q. Do you know whether or not you have any feed tests that relate to the feed stored in either of the Harvestore silos, other than your very most recent feed tests?

A. I believe that that is all I have.

Q. You just have the most recent ones?

A. Yes.

\*\*\*

A. [p. 135] Yes I did.

Q. Tell me what else you looked at other than the Harvestore.

A. We inquired about the cement stave silos.

Q. When you say we, who do you mean by we?

A. My wife and I.

Q. Who do you recall speaking to about cement stave silos?



A. Well, I had a lot of -- I mean, I guess some neighbors, but I had a lot of experience with cement stave silos over the years myself.

Q. Which of your neighbors did you talk to about stave silos?

A. Right offhand, I couldn't tell you.

Q. Do you recall what you spoke to your neighbors about at that time?

A. I guess I went over there and looked at their haylage that was coming out of the silos, the feed, the feed that was coming out.

Q. That was coming out of their stave silos?

A. Yes.

Q. And do you recall speaking, asking those farmers questions about their feed?

A. Yes, I can remember.

Q. Do you recall anything specific about the

\* \* \*

[p. 137] you were looking at in terms of whether they were top unloading or bottom unloading?

A. They were all top unloading.

Q. Do you remember anything that Mr. Von Bank told you about the cement stave silos you were looking at?

MR. BIRD: Other than the price, you mean.

BY MR. SHEPARD:

Q. Right.

A. I believe we went with him a day and toured a few farms. And I guess they showed me the quality of the feed they had coming down.

Q. And do you remember when you went on this tour with Mr. Von Bank?

A. I believe it was in early '74.

Q. Where did you go?

A. I do not know. It was out in Carver County somewhere.

Q. How many farms did you go to that you recall?

A. I'd say two, at least.

Q. Did you talk to the farmers on those farm tours about their feed?

A. Yes.

Q. Would it be your recollection that the two farms that Mr. Von Bank took you to had the same make of [p. 138] silo that he was interested in selling to you?

A. Yes, I believe that.

Q. Did you contact Mr. Von Bank to tell him you were interested in purchasing a silo?

A. Yes, I believe that.

Q. How long did you spend on the farm tour with Mr. Von Bank?

A. Maybe a half hour, 20 minutes to a half hour on a farm.

Q. Did you have an opportunity to ask questions of the farmers on those farm tours?

A. Yes, I had the opportunity.

Q. Did you have the opportunity to ask them whatever you felt you wanted to know about the operation and use of their stave silos?

A. Well, they had experience with chopping of hay and this and that, and it looked like the type of thing that I wanted to go to. We looked at the quality of feed. It did not look bad. I thought it was good feed.

Q. The quality of the feed looked good to you?

A. Yeah.

Q. Did the farmers indicate to you that they were happy with the quality of the feed?

A. Yes, I'd say so. Yes.

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[p. 146] that would be most of them.

Q. Before you talked to Mr. Deutsch had you gathered any information at all about Harvestore silos?

A. Well, yes, I had gathered information. We had experience with the one on the farm and I was very interested in the Harvestore.

Q. Had you talked to any neighbors or people that you knew that had them, the way --

A. Before I talked to Mr. Deutsch?

Q. Yeah.

A. I have to say no.

Q. But from your experience using the Harvestore 17 by 40 on the farm, you were interested enough to look into buying another one?

A. Yes.

Q. I understand you don't recall what was said at the first conversation or the first meeting you had with Mr. Deutsch. Tell me as best you can what you first recall being said at any of those meetings you had with him leading up to the purchase of the silo.

A. Well, I'm sure the first visit was a get-acquainted visit. I'm sure some information was dropped off, conversation was probably done for a few minutes or so,

and then I would assume that maybe a week or so [p. 147] later he called back or contacted me back.

Q. Do you have a specific recollection that Mr. Deutsch gave you any literature at that first meeting?

A. Oh, I would definitely say yes.

Q. Do you remember that as you sit here or is that just what you assume?

A. I'd say yes. Absolutely yes.

Q. You definitely remember him giving you literature at that first meeting.

A. Almost every time he dropped off literature.

Q. Do you recall specifically what advertisements or literature he gave to you at that first meeting?

A. I could not recall.

Q. Do you recall when the next meeting with Mr. Deutsch took place?

A. I do recall him coming into the house in the kitchen. Mary and I sat by the table and we discussed things. He had a movie projector with him. There was a lot of conversation. I'm not saying this was the second visit or the third visit; it was in this time period. A lot of literature was left with us, and I believe that Mary and I looked at the movie after he left.

Q. This particular meeting you're talking about at the

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[p. 149] at those meetings before the meeting where you sat around the kitchen table with him.

A. Well, I know that once we left him in the house with the movies and the conversation that there had to be a lot of other contact with him and the conversations that were said was more production, more convenience, less protein, absolutely less protein, easier putting it up, which would fall under convenience, bottom unloading, which was a big advantage, Mr. Deutsch said. We could fill and unload at the same time, where with the cement stave silos we had to crank the unloader back up.

And Mr. Deutsch never had nothing good to say about the cement stave silos because of the disadvantage of cranking the unloader up all the time. And he told me several incidents of farmers who crawled up those silos and they went up and down in that dust and they said they had gone to hell. I mean, they thought if you ever lived in hell, it was crawling up and down those hay chutes because of the dust that accumulated in there. And so it was a deciding factor of the Harvestore.

Other conveniences, I guess I'd have to -- we'd have healthier cows. It was mentioned we'd have better milk production. Easier to get [p. 150] out in the field and chop it at an earlier stage, could make the haylage early. All those things seemed to come to the bottom line that we'd be making more money. And that they would pay for themselves.



Q. Are those representations that you've just told me about all of the representations you recall Mr. Deutsch making to you before you purchased the silo?

A. I'm sure there was more.

Q. Are there any more that you recall other than what you've just mentioned?

A. That oxygen did not come in contact with the feed. And with my experience of oxygen coming in contact with my feed over the years, I knew that that would be a big advantage. And there would be less spoilage; that you could mix any crop, one on top of the other, didn't make any difference. I believe at this point that covers most of them. I can't think of more offhand.

Q. Are the representations that you just told me about things that Mr. Deutsch told you about over the course of several discussions with him?

A. Yes.

Q. Let me just go back through the list and ask you [p. 151] some questions about some of the things you've mentioned. The first thing I have written down here is more production. Did Mr. Deutsch give you any sort of explanation as to why you might expect more production?

A. Because of the better quality feed that we would get out of the silo.

Q. Did he tell you why you might expect to have better quality feed coming out of the Harvestore?

A. Because oxygen did not come in contact with the feed.

Q. Do you recall anything else that he told you with respect to this item of more production?

A. Well, the better feed would make healthier cows and healthier cows made more milk. And you could put up your haylage at an earlier stage, save more protein or save more leaves, which would give you better feed quality. The first in/first out was an advantage, because you don't have this changing of rations always. All these things would give you more production.

Q. The next thing I have written down here that he told you was that there would be more convenience. And I believe that you -- I wrote down here just about as much of what you said as I could. Let me

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[p. 153] that was always a problem, somewhat of a problem, with top unloading, and that you would not have that problem. And in the wintertime the cows would consume more feed because it was not just frozen feed that you were feeding them. It would be warm feed.

Q. And did he tell you why you could expect to have warm feed?

A. Well, because you're underneath the pile, you're inside of the pile and not taking off the top every day.

Q. The next thing I have written down on my list here is that you could fill and unload at the same time, and I think



you've told us about that. Was there anything else that you haven't already mentioned that Mr. Deutsch told you about your ability to feed and unload at the same time?

A. No. I would say that would be, pertaining to that subject, that was all.

Q. And am I correct that that feature, the ability to feed and unload at the same time, was one of the conveniences that Mr. Deutsch was telling you about?

A. Yes. That was one of the conveniences.

Q. And the same with bottom unloading? Was that one [p. 154] of the conveniences he mentioned?

A. Yes.

Q. The next thing I have written down here has to do with healthier cows. What did Mr. Deutsch tell you about healthier cows?

A. Well, he said if you get the feed, by putting it through a Harvestore you were able to put it up at a much younger stage, save all the leaves. You'd have a much better feed quality, and with a better feed quality you're going to have a healthier cow.

Q. So am I correct that you understood from what Mr. Deutsch was telling you that healthier cows was one of the results you could expect from having better feed?

A. Yes. I would say that that would be true, yes.

Q. We already talked about better production. The next thing I have written down here that you said was that it would be easier to chop the alfalfa at an earlier stage and you could make haylage earlier. Is that what he told you, as best you recall?

A. Well, what we talked about was basically that with the Harvestore that you could get out there earlier, cut the stuff at an earlier stage, prebud stage, gather that, get the highest protein. And [p. 155] by saving, by chopping a little bit earlier and saving the leaves you would have more protein. That was the big advantage.

Q. And when he was talking about being able to chop at an earlier stage, was he comparing your ability to make haylage for the Harvestore with dry hay, baling hay?

A. Repeat that question.

Q. That's a terrible question. I apologize. When he said that you would be able to chop the alfalfa an earlier stage and make the haylage earlier, what was he comparing that to?

A. To baled hay.

Q. And because you were making haylage instead of baling hay, he told you that you would be able to save more of the leaves from the alfalfa plant?

A. Yes.

Q. And, therefore, you would get more protein than if you were baling hay?

A. Yes.

Q. The next thing I have written down here, and this is kind of a paraphrase, but you said the bottom line was that you would be making more money and that the silos would pay for themselves. Is that accurate?

A. [p. 156] Yes.

Q. Did he explain to you why you might expect to make more money?

A. Because of the better quality feed and the less protein that I would have to buy and more milk.

Q. Did he explain to you why you could expect the silos to pay for themselves?

A. He showed us on paper as to how they would pay themselves off by saving -- by the increase in production and the savings on the protein he could prove to us that it was a profitable thing.

Q. And the increased production and lower protein that he talked about was, as you understood it, because you could expect to have better feed from the silo?

A. Yes.

Q. The next thing I have written down here is that he told you that oxygen would not come in contact with the feed. And then I believe you said that you knew that that was a big advantage based on your experience with oxygen contacting feed that you had experienced on the farm, or something to that effect. Is that correct?

A. Yes. Yes.

Q. And the next thing I have written down here has to [p. 157] do with less spoilage. And am I correct that -- well, let me ask you the question this way: Did he tell you why you could expect less spoilage from a Harvestore?

A. Because it was an airtight structure. The air did not come in contact with the feed. And my experience was that with that you would have less spoilage.

Q. And that was because you had experience on the farm where you had observed spoilage from the contact with oxygen.

A. I had seen spoilage on the farm before, yes.

Q. And that was before 1974.

A. Yes.

Q. The next thing I have written down here is that you could mix crops, one on top of another. Tell me what he told you specifically with respect to that.

A. Well, as far as you could fill silo and the following crop or if it was hay, again, you could put right on top of the next one. And if there was some corn silage or something that you wanted to put in between there, that you could put that on top and go right back into haylage again. I guess that would pretty much cover it, that you could [p. 158] keep on mixing, I mean, putting different varieties of forage in the same silo.

Q. You mentioned, when Mr. Deutsch told you the silos would pay for themselves, that he did some sort of projections for you.

A. Yes.

Q. Do you have those figures that he produced for you?

A. No.

Q. Did you save them?

A. No.

Q. Do you recall specifically what he told you with respect to the ability of the silos to pay for themselves?

A. He said in four to five years that we should be able to pay the silo back. It would pay for itself.

Q. When you were talking to Mr. Deutsch about all of these things, had you and Mr. Deutsch, were you talking about a specific size and specific model Harvestore or were you just talking generally at this point?

A. I would believe at this point it was just generally.

Q. He was just talking about Harvestores generally?

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[p. 166] closed the thing up and then they air checked it with sealers. Guys would check every seal, every bolt. It was put tog ether with very good craftsmanship. I liked that part. I seen several movies - I don't know if that one --

I think that would probably be basically the end of that movie.

Q. Who was present with you when you looked at that --

A. Mary and -- excuse me. Mary and I.

Q. Was Mr. Deutsch present for that, when you looked at it?

A. Okay. I do not think he was.

Q. Is that everything you remember about what you saw in the movie?

A. Yes. I would say in that movie, yes.

Q. Did you have any questions after you saw that movie that you asked Mr. Deutsch?

A. Well, I would assume that we talked about the foundation, the footing, as to how many yards of cement it was going to take. And I guess that at the end the finished product would be that it would-be tested so that I would know I had an airtight silo, because I was very concerned about that.

Q. Why were you concerned about that?

A. Well, that was going to be my big factor, that I [p. 167] could keep this oxygen out of my, coming from contact with my feed.

Q. And why were you interested in doing that?



A. To eliminate spoilage.

Q. Did Mr. Deutsch answer any questions you had about the movie after you saw it?

A. I'm sure he answered all the questions that I had, but I can't remember all the questions that I asked him at that time.

Q. Do you remember anything he told you about anything that was said in the movie after you saw it?

A. I would say not.

Q. Do you remember when it was that you first saw this film, Birth of a Harvest?

A. The summer of '74.

Q. Have you seen that film since that time at all?

A. Yes, I have.

Q. When have you seen it since then?

A. In my lawyer's office.

Q. Is that the only other time you've seen it?

A. And I seen it recently in our own house.

Q. When did you look at the movie at your own house?

A. About a week ago.

Q. Was that before the weekend, this past weekend, or since then?

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[p. 169] They showed people cutting hay and then running with the choppers and blowing it into the silos. And they showed the, talked about the early stage of cutting and they talked about all the protein you're going to save. And the protein that you saved was going to give you better feed and the better feed was going to make healthier cows. Wouldn't make them, but you'd have healthier cows. And healthier cows meant more production, more production meant more income, more income meant better living.

Q. And were all those things that you saw in the movie important to you?

A. Yes. I'd say the whole movie was very important to me.

Q. The parts of the movie that showed the progression, as you say, to chopping alfalfa rather than baling it and moving to automation, those sound like things that you were interested in based on what you told me earlier about your desire to put up another silo to help you expand. Would that be accurate?

A. What silo are you talking about?

Q. Well, I thought you told me earlier that when you decided in 1974 that you wanted to buy another silo

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A. [p. 176] It was The Magic of -- no.

MR. BIRD: Here, it's on your --

THE WITNESS: I get the names mixed up. The Magic of the Harvestore Storage.

BY MR. SHEPARD:

Q. Where did you see that film before?

A. And I believe I seen that one in New Prague, or one of the Harvestore meetings that they had.

Q. When you talk about the Harvestore meetings they had, what are you referring to?

A. At least once a year they'd invite us up there. It was sort of a winter thing, but I think it was an educational thing. They kind of updated us on how to educate us on how to keep putting up good haylage and all these things. And if they had any new items that they sold and they always had a dinner with it and we always got a card and invitation to come up.

Q. How many years did you and your wife attend the winter meetings?

A. Mary never went too often to the winter meetings. I usually went. She might have gone to one of them. We went many years, I mean before and after.

Q. You went many years?

A. Yes.

Q. [p. 177] Did you make an effort to go to the annual meetings at New Prague every year?

A. Well, I made an effort, yes I was excited about Harvestore and, yes, I would say I made an effort. Not saying I made it every year, but yes, if --

Q. Can you give me an idea how many of those meetings you believe you attended from 1969 to 1972? Or 1992. I'm sorry. From 1969 up to the present time.

A. Half a dozen.

Q. How many of those meetings did you attend before 1974 when you bought the silo?

A. I'd say one, maybe two.

Q. At the winter meetings would there be a speaker or someone who would come in and talk about things?

A. Oh, yes. Yes.

Q. What do you recall was discussed at those meetings, at the two meetings that you attended before 1974?

A. Well, they discussed the advantages of the Harvestore.

MR. BIRD: Now you've got him at two meetings. He said one to two.

BY MR. SHEPARD:

Q. Do you remember whether there was one or two before 1974?

A. [p. 178] One for certain, possibly two.

Q. Okay. Whether you were at one meeting or two meetings before 1974, tell me what you recall about what was discussed at those meetings.

A. The advantages of the Harvestore system, the oxygen-limited structure and how it all worked and how the oxygen stayed out of that silo. It was an airtight structure.

Q. Was there ever a speaker who would come and talk to the group?

A. Yes.

Q. Was that a farmer or was it someone from the industry or who spoke at the meetings?

A. Many times they had farmers or current owners of Harvestores. And I would -- A. O. Smith personnel.

Q. Do you remember who spoke at the one or two meetings that you attended before 1974?

A. I cannot remember the names of anybody, no.

Q. Do you recall whether or not it was a farmer, another farmer, Harvestore owner, who spoke at the meeting?

A. I know that just about every meeting, even later on, there always was some Harvestore, some happy Harvestore owner that talked.

Q. Do you remember who any of those happy Harvestore [p. 179] owners were that spoke at the meetings?

A. I know Ben Zweber talked at one of them.

Q. Do you remember when you first heard Ben Zweber speaker at one of those meetings?

A. That was after the purchase of the silo. I'm not going to say the year. I'd say a couple years afterwards.

Q. Do you remember anybody else other than Ben Zweber who came in and spoke to the group at those meetings?

A. No.

Q. Was he the only person that you recognized or knew?

A. He was the only one that I knew by name. But there was many people there from the company.

Q. Had you known Ben Zweber before you saw him speak at that one particular meeting?

A. Yes, I knew Ben Zweber.

Q. How did you know Ben?



A. Well, Ben and I don't live that far apart, and I guess Ben was probably one of the first guys who had a lot of Harvestores, and so I guess we kind of envied Ben. We thought Ben was a good farmer. And so over the years, I guess, before even -- I've known Ben for quite a few years.

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[p. 181] the haylage he was getting from the Harvestore?

A. That was the impression I got.

Q. Did he indicate to you that he was satisfied with the way the silo worked for him?

A. Yes. That's the impression I got.

Q. Did you get a chance to look at the haylage that he had coming out of his silos?

A. Yes.

Q. What did the feed look like?

A. Well, it was a lighter green, greenish -- I shouldn't say light green, but it was sort of a greenish colored haylage.

Q. Do you remember anything else about how the haylage looked?

A. How it looked?

Q. Yeah.

A. It looked like, at that time I didn't know that much about haylage, but it looked like haylage to me.

Q. Do you remember Ben Zweber telling you anything else about the haylage that he had on his farm?

A. I'm certain he mentioned the protein and the quality of haylage he had. Yes. I guess that would pretty much cover it as to quality that he had.

Q. [p. 182] What did he tell you about the protein in the haylage that he had?

A. Well, he was very much satisfied with the high protein level that he could obtain over baled hay that he used to years ago. He used to bale hay, and he was very satisfied with his Harvestore.

Q. And did he indicate to you that the protein level in his haylage was greater than the level of protein in his baled hay?

A. That was the impression I got, yes.

Q. Do you remember anything else that you and Mr. Zweber discussed when you went to his farm?

A. We had talked about, he had just gotten a Heston self-propelled swather from the Heston company that they wanted him to try out. And it was sitting in the yard, he had just gotten it that day. That's why I can remember the visit, because it was sort of like a demonstrator that they wanted him to try out. And so I know we talked about that self-propelled swather that was sitting there.



Q. Did you believe that what Mr. Zweber was telling you was true about his experience with the Harvestore silo?

A. Well, what Mr. Zweber was telling us was basically the same thing that I had read in the articles and [p. 183] seen on the movies, that this was almost, basically I would have oxygen limited and oxygen would not come in contact with the feed and that I would have better feed value and healthier cows, more milk and more income.

Q. And those were all things that Mr. Zweber told you?

A. What he basically told us that day was the same things that we had pretty much gone through in the literature my wife and heard or read.

Q. How long did you spend talking to Mr. Zweber that day you went to his farm?

A. Half hour, 45 minutes.

Q. Did you have the opportunity to ask him whatever you wanted about his feed?

A. Yes.

Q. Did you ever talk to Mr. Zweber after that particular farm tour in 1974?

A. I've talked to Mr. Zweber several times. Many times, several times.

Q. Since 1974?

A. Oh, yes.

Q. What have you talked to him about since then?

A. Well, he has been out to my farm several times trying to have me switch my, shipping my milk to, from the creamery we are to the NFO creamery that

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A. [p. 187] At that time, yes.

Q. Can you give me an idea of how many twisted stomachs or how frequently you had them in the herd?

A. We never had a twisted stomach before we went to Harvestore. I never, my dad and I never knew what a twisted stomach was.

Q. So you never had one until 1974?

A. I would say that's very correct.

Q. Between 1974 and the date when Mr. Zweber called you, how frequently did you have twisted stomachs in your herd during that time period?

A. I'd say maybe two a year.

Q. Did you consider that to be an unusual number of twisted stomachs to have in a herd of your size?

A. I guess at that time I didn't give it that much -- listening to the vets and everything, I think it was just an average herd. I think a lot of people were having twisted stomachs that were feeding the chopped feed. That seemed to create more of a problem.

Q. So during that time would I be correct in saying that you do not think you had any sort of an unusual problem with respect to twisted stomachs for a herd of your size?

A. [p. 188] Before what time?

Q. Before you talked to Mr. Zweber.

A. I'd have to say I'm sure it was a concerned problem. I don't know what is a lot and I don't know what is many. I guess none is good, but a few of them -- it's hard, without looking at my records, I can't say if that was an exceptionally large number compared to years later on as we went along.

Q. When you first experienced twisted stomachs in your dairy herd what did you do about it?

A. Well, the first ones, the veterinarian used to tell us, we tried rolling them. At first they didn't operate on them as much as they did later on. We tried rolling them. And I guess some of them we did have good success with and some of them we didn't.

Q. You're talking about actually rolling the --

A. Animal over.

Q. And trying to get the stomach to untwist?

A. Yes.

Q. Did you talk to your veterinarians about that?

A. They were there at the time when we rolled them. They showed us how to do it at first.

Q. What did they tell you about the cause of the [p. 189] twisted stomachs?

A. I'd --

MR. BIRD: Wait a minute. What are you talking about? Way back then?

MR. SHEPARD: Yeah.

MR. BIRD: At the time he first had the DAs?

BY MR. SHEPARD:

Q. Right.

A. I guess the first time, I don't think we talked about it, as to how they got it. Just was something they had.

Q. At any point between 1974 and the time Mr. Zweber called you in or around 1982, did you ever talk to your vets about what might be causing the twisted stomachs?

A. Yes.

Q. When do you first remember talking to your vets about the cause?

A. I can't remember when I first talked to them, but it was -- I can't pinpoint any date to it.

Q. Which vet do you recall speaking to?

A. Dr. Mittelsted was our vet then.

Q. Mittelsted?

A. Yeah. Dr. Mittelsted.

Q. [p. 190] What did Dr. Mittelsted tell you about the twisted stomach?

A. He used a stethoscope to find out what side it was on and he showed us how to roll them. And I don't believe Mr. Mittelsted ever performed an operation on them. As far as conversation with him, I do not believe that it was ever mentioned as to what was causing this at that time.

Q. So you never talked to Dr. Mittelsted about what was causing the twisted stomachs?

A. Not the earlier ones, no.

Q. At some point did you talk to him about it?

A. Yes. I would say somewhere down the line it was talked about as to the feed being chopped too fine.

Q. When did you talk to him about that?

A. I couldn't say the year. I wouldn't know.

Q. Was it before your conversation with Mr. Zweber?

A. Oh, yes. I'm certain it was.

Q. And he told you that the twisted stomachs were caused because the feed in the Harvestore silo, the haylage was being chopped too fine?

A. Well, something, it had to do with the fine chopped feed, yes. That was my understanding as to what was causing it.

Q. And did he tell you that it was being caused by [p. 191] something related to the Harvestore feed?

A. He didn't specifically say the Harvestore feed, I guess. He just said chopped feed.

Q. Did you talk to any of your other veterinarians about the cause of the twisted stomach?

A. Well, he was my veterinarian for quite a few years. Then he passed away and we went to another vet, and by that time we were pretty well informed as to twisted stomachs and what to do with them.

Q. What did Dr. Mettelsted tell you to do to help prevent the problem?

A. To feed them some long-stemmed hay. A slice of hay, long-stemmed hay would be good for them.

Q. Was that something you had been doing up until that time?

A. Well, we were feeding some long-stemmed hay. We always did. But he advised us that was an advantage.

Q. And that you should keep doing that?



A. Yes.

Q. When you talked to Mr. Zweber on the telephone when he called you, did you tell him all that information?

A. No. He just asked, he didn't ask me for that. He asked me if I was having a lot of problems. And in

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[p. 200] going to have to have him read this thing from cover to cover.

MR. BIRD: Well, I mean, all I'm saying is if you're going to ask him detailed questions similar to what you did with the other document, I don't see any way around it other than to have him read it. But if you want him to do a general broad-brush, I think that's easier as long as it's understood that that's what he's doing as opposed to nitpicking each page. I think we ought to have that understanding. That's all.

BY MR. SHEPARD:

Q. Okay. Let's do that. Mr. Klehr, first of all, do you recall seeing this document anytime before you started the lawsuit in 1991?

A. Yes, I do.

Q. When did you first see this?

A. This was before 1974.

Q. How did you get that document?

A. This was in our house.

Q. Do you remember how you got it in your house?

A. Well, my dad had a Harvestore and he left all farm operating equipment books for any equipment that he bought, that stayed with the farm.

Q. So am I correct this document was left in your

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[p. 202] structure, the air is drawn into the breather bags." That was very interesting.

BY MR. SHEPARD:

Q. You're reading from the paragraph down in the lower left-hand corner?

A. Yeah. I'm sorry if I didn't --

Q. Yeah. I just want to make sure it's clear.

A. And the first sentence, "The Harvestore system is much more than a silo. It is an advanced system of storing and processing livestock feed."

Q. Why was that statement at the top of the page significant to you?

A. Because I was, at this point I was comparing two silos. I was comparing a cement stave silo to a Harvestore unit.

Q. And what did this particular statement lead you to believe that was important to that comparison that you were making between the Harvestore and other forms of storage?

A. Because of their advanced technology they were going to keep the oxygen out of the feed. It was an oxygen-limited structure.

Q. And with respect to the paragraph at the bottom of the page about the oxygen-limited storage, why was that information important to you?

A. [p. 203] Because it says here that the advanced system, so in other words, they had done a lot of engineering already on this thing. Advanced means that they were ahead of times.

Q. Well, let me ask you this question: Down at the bottom where you talk about, it says, "The primary design feature that makes oxygen-limited storage possible," what was it about that particular paragraph that was significant to you? Why was that information important to you?

A. Because they talked of the breather system, of the air not coming in contact with the feed.

Q. Why was that important to you?

A. Because of the experience I've had on the farm over years and knowing what air with contact with feed would do.

Q. What did you know that air contacting feed would do?

MR. BIRD: Object. You've already gone over this, Counsel. This is like the third time you've asked him that very same question.

MR. SHEPARD: Well, they're his words.

MR. BIRD: Well, I'm going to object. You've already covered this area. You've already asked him these questions about oxygen getting to

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[p. 208] nutrition growth, wilt to 35 to 55 percent moisture, chopped at a fourth to three-eighths inch cut and process through a Harvestore."

I always felt by chopping it a little bit sooner than -- at 35 to 55 sure beats the baled hay, and I could save a lot more protein there. My baled hay, I had to wait to 29, or from 25 to 30 percent moisture.

Q. You had to wait until it was 25 to 30 percent moisture before you cut it?

A. Well, no. Before I could bale it. The baling end, I had to wait a lot longer. It probably was in the 20 to 25 range with baling, maybe 30.

Q. Okay.

A. Page 27, "The best assurance of profitable haylage is to cut it at the right time, let it wilt, chop it fine. This gets as much as possible of the protein rich alfalfa or other legumes or grass leaves and fine stems into the Harvestore



structure. Purchase of costly protein supplement is greatly reduced or eliminated."

(Pause.) And on page eight. The first paragraph, "There is a old saying that any line of products is only as good as the service behind it. A.O. Smith Harvestore is proud of the U.S. and

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A. [p. 211] Okay.

Q. Do you recall seeing this document before the lawsuit was started in 1991?

A. Yes.

Q. Do you recall when you first saw it?

A. This I seen after I, after 1974.

Q. Do you remember when you first saw it?

A. I could not tell you the year.

Q. Do you remember how you obtained a copy of the document?

A. I'm sure through the mail.

Q. Do you remember who mailed it to you?

A. Well, I would imagine -- well, maybe A.O. Smith, or MVBA. Either one. It's hard to -- it's fairly vague what you're looking at. It's a faded color.

Q. I appreciate the fact that the photographs don't reproduce very well. Can you tell me what, if anything, in this document was important to you?

A. Well, page seven.

MR. SHERAN: Excuse me. Did he say he saw this before or after 1974?

MR. BIRD: After.

THE WITNESS: After. About "Our breather bags work over a wide temperature range." Page seven. "The Harvestore breather system [p. 212] protects feed from oxygen throughout the normal daily range of temperatures experienced in most parts of North America."

On page 16 they talk about the construction of the silo and how "Bolts are inserted where sheets overlap and tightened with speed wrenches. Then they're set to A.O. Smith specifications with hand torque wrenches."

And they show a picture of the bolts and the sheets overlapping as the bolts are tightened. Sealants flow around them "to create a sound joint that will resist leaks for many years."

Q. Why was that important to you?

A. Well, these are things I read after I bought the silo, but it was, I guess, updating information that I had read previously.

MR. BIRD: Wait a minute, now. Look through the whole document. He's asking -- you want him to read this whole document, carefully?

MR. SHEPARD: No. I mean, I just want to know

MR. BIRD: Well, he's closing the book before he even looked at all the pages. And I want to make sure that if you're going to hold him to this that I want him to read the whole thing

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[p. 218] any business."

Q. Let me back you up to page two, the article there that's entitled Haylage Boosts Top Production Even Higher. Was there anything specifically in this article that was significant to you, or was it simply of interest to you that there was an article here about a dairyman whose milk production was apparently projected to hit 20,000 pounds?

A. I guess right now I would have to say it was the article as to those guys increasing their production with the Harvestore system.

Q. Okay.

A. There is another story on page six of a successful farmer, a story of how they increased their production with -- by going to the Harvestores they could reduce the corn silage and put up more haylage and save on protein.

On page six, the oxygen-limiting storage makes top quality feeds. There they have the moon and the sun. And under oxygen-limited, about two-thirds of the way down it says, "Feed storage made possible by Harvestore's time-proven breather bag system described at the right minimizes feed losses from oxidation, mold and other enemies of feed quality. Anaerobic bacteria initiate a

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[p. 220] the safest place to put money, the Harvestore is the most secure repository for valuable grain and forage crops. And just like the bank, the Harvestore can pay big dividends in increased return per acre, greater feeding efficiency and reduced labor requirements.

"These benefits are inherent in the Harvestore because it is truly a system, a system designed to solve the major problems of on-farm feed handling which have troubled farmers for centuries."

Q. And what was it in that particular part of this document that you thought was important?

A. It's a good investment.

Q. Okay.

A. The center fill tank, on page seven, "When you fill with a PTO-powered blower, the Harvestore center fill pipe assures that grain or forage follows the proper flow path for best performance.

"When feed drops directly into the structure's center, your Harvestore unloader works most efficiently to assure smooth, uninterrupted feed flow throughout the year."

Q. And what was it about that aspect of the document that you thought was important?

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[p. 229] Are you ready to give an answer on something?

THE WITNESS: Yes. I'd like to have your attention. On page four in Exhibit 6, What Is a Harvestore? In about the middle of the page.

BY MR. SHEPARD:

Q. Can I see where you're looking? Okay.

A. "A Harvestore system is more than a silo. It's an entirely new concept of feed management. Because of its durable construction, oxygen-limited environment and bottom unloading features, it gives the farmer nearly complete control of his feed management allowing him to harvest and store his crops for maximum nutritional value and to feed them when and how he desires. The Harvestore farmer is no longer at the mercy of the whims of nature and the economy.

"Glass fused to steel construction is a basic key to the success of the Harvestore design. The heavy steel plates that make up a Harvestore are coated on all sides with a tough layer of cobalt blue glass fired in 1,600 degrees Fahrenheit to create a firm bond between the steel and the glass."

Q. Okay.

A. [p. 230] And then the top paragraph on the same page to your right, "To prevent spoilage of feed while in storage, the Harvestore system is designed to provide an oxygen-limited environment. Without ready access to air, mold, oxidation and destructive bacteria are unlikely to attack the feed and destroy its nutritional value and palatability.

"To prevent the entire oxygen, each Harvestore plate is joined at the edge with durable sealer and securely bolted to its neighbors. The Harvestore bolts -- there are more than 11,000 of them in a 25 by 80 Harvestore -- have rounded plastic-capped heads on the inside of the unit to resist corrosion and maintain a smooth surface. On the outside nuts are precisely tightened and torque wrenched during construction."

I relied heavily on the oxygen-limited breather system that they had.

Q. Okay. And we've already talked about the reasons for that, is that right?

A. Yes. It seems that every page, or many pages in these books always talk about the oxygen-limited. I guess it's all over. Wherever you look, that's what they advertise.

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[p. 237] of, loss of feed value. When it's in a conventional silo it's much higher, it says.

BY MR. SHEPARD:



Q. Okay. Where are you looking, just so I'm clear on what part of this you're looking at now?

A. Okay. Well, number five. "Because it's stored in an oxygen-limited environment, haylage is protected from storage losses caused by spoilage, mold and oxidation of nutritional elements. Under good management only about three to four percent of dry matter will be lost during storage in a Harvestore system, and most of that is the result of natural fermentation process that makes palatable feed. By contrast, losses in other types of storages can be considerably higher."

Q. And why was that paragraph important to you when you read it?

A. Well, it convinced me that I was still doing the right thing, that I wasn't getting any loss and I made a good buy. Number 22 on page six.

Q. That entire paragraph?

A. Yes, I would say so.

Q. And why was that paragraph important to you when you read it?

A. It's pertaining to better animal health. [p.238] "Harvestore" system owners report general improvement in animal health when haylage is fed. Soggy forages such as corn silage or hay crop silage at 60 to 75 percent moisture can lead to digestive problems in cattle. Dust and mold in dry hay can also be harmful to animals' health. Harvestore system haylage provides dust-free and-easy-to-digest

rations." Another reason to believe that I bought the best silo.

Q. Okay. Is there anything else in this exhibit?

A. Page 10, and 11. They're both the same. They're all about storage, about farmers having success with their Harvestores and making lots of money.

Q. Why were those stories important to you?

A. It assured me that it's obtainable from owning a Harvestore.

Q. Okay. Is there anything else?

A. No, that would be all.

MR. BIRD: In fairness to the witness, he's been working a lot harder than we have. I want to ask him if he wants to have a break here.

THE WITNESS: That would be fine.

MR. SHEPARD: Okay. That's fine.

(Brief recess.)

BY MR. SHEPARD:

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[p. 242] on their own.



Q. What did this article make you think with respect to what you were doing on your own farm?

A. That my Harvestore system was working just fine.

Q. When you say that, are you talking about the high-moisture corn?

A. High-moisture corn, yes. Then on page 14 they have a conclusion of the study that they did. "The high-moisture corn preserved in a Harvestore resulted in excellent milk production. Milk composition was normal after adjustment of cows to high-moisture corn. Body weight gains of cows reflected high energy in take with low-moisture corn rations. High-moisture corn was very palatable to dairy cows." I found that the cows always liked my corn. So it made me feel that I was doing the right, going the right direction.

Q. Were those conclusions that are stated there consistent with the experience you had had on your farm feeding high-moisture corn?

A. My cows liked my high-moisture corn.

Q. How about the other conclusions that are stated there?

A. Well, it's hard to say the high-moisture corn preserved in a Harvestore" resulted in excellent [p. 243] milk products. It would be easy to say that if corn was the only thing you feed. But when you feed five, six different things, you can't give all the credit just to one just because it's in there. You got to give credit to the others.

Q. Well, when you read this about high-moisture corn resulting in excellent milk production, did you read this and think to yourself, yeah, that's true of my farm, too?

A. That I'm getting that 2.2 percent milk?

Q. Or that you're getting excellent milk production?

A. I guess at the time I felt maybe I was getting excellent milk production. At the time.

Q. Do you know what your milk production was at the time you saw this, or read this?

MR. BIRD: I'm going to object. There's no foundation. He can't recall when he read it, so it's not possible for him to --

BY MR. SHEPARD:

Q. That's all I'm asking. He can tell me if he remembers.

A. No, I would not remember. (Pause.)

Q. Page 24. "Why is a Harvestore called an oxygen-limited crop processing system?" They did research. "Authorities in this research bulletin [p. 244] have covered the specifics of feed making in a Harvestore oxygen-limited structure. Their research shows a very decided advantage of using the oxygen-limited method of crop processing and storage.

"It is important to the final quality of the feed and the performance of the livestock we have seen that air be

limited while the crop is in storage. The Harvestore structure is as sealed a unit as can be practically assembled and operated with present technology. After filling the Harvestore structure it is closed using the top latch. Any oxygen in the air trapped in the structure at filling is quickly used up by the fermentations in the feed being processed.

"In fact, it should be completely utilized three to four hours after filling doors are shut in the fermentation process. Plant and bacteria enzymes take the starches and convert them in part to sugar. Sugar, through bacterial action, are converted to acids and carbon dioxide. As the acidity increases enough, it brings to a halt a bacteria action. The oxygen is used in the process. Soon there is a low pH and an absence of harmful oxygen. In a way, it is similar to a

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A. [p.254] At what time?

Q. Yes.

A. I'd have to say very recently.

Q. Since you started this lawsuit?

A. Yes.

Q. Let's look at Exhibit 14, please.

MR. BIRD: "This is a long one. He's going to take some time going through it. Do you mind going off the record so I can ask you some questions?

(Off-the-record discussion)

BY MR. SHEPARD:

Q. Mr. Klehr, looking at Exhibit 14, do you recall seeing this document before you filed this lawsuit?

A. Yes, I do.

Q. Do you remember when you saw it?

A. Back in probably '83, '84.

Q. Do you remember how you got it?

A. Probably, I'm certain it was sent to me.

Q. Is there something specific you recall reading in this document that was important to you when you read it in 1983 or 1984?

A. They don't have page numbers on here, but I believe it's page three. No. Maybe four. Page four.

Q. [p. 255] What does it say at the top?

A. Oh, boy. A Program to Efficiency: Manage Your Feed.

Q. Okay. I gotcha.

A. The article under the Harvestore structure is oxygen-limited. "Forage or grain is protected from the free access of air by a breather system, helping prevent spoilage and production and mild fermentation that gives feeds an

appealing odor and palatable taste. Breather bags expand and contract to relieve changes of pressure inside the structure as outside temperatures rise and fall. Outside air doesn't have to enter the structure because over fermentation oxidations are minimized. More nutrients are preserved. That means more feed power to help your livestock perform at their best."

Q. Is there anything else here that you recall reading in '83 or '84?

A. No. That would be all.

MR. BIRD: Shall we quit?

MR. SHEPARD: Sure. That's fine. Let me indicate for the record that we still have a number of advertisements that we have not had a chance to review with the witness. In

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[p. 269] one of the things that Mr. Deutsch told you is that you could expect increased milk production when you put the Harvestore on the farm. Is that correct?

A. Yes.

Q. Did he make any statements to you about how much additional milk production you could expect from use of the Harvestore?

A. Yes.

Q. What did he tell you?

A. From three to five pounds increase.

Q. An additional three to five pounds of milk per cow per day?

A. Yes.

Q. And did you understand that to be a one-time increase or something that you would get each year you used the Harvestore?

MR. BIRD: I'm going to object. What do you mean by one-time increase? As opposed to each year?

BY MR. SHEPARD:

Q. Well, I guess what I mean is, did you understand that to mean that your production would go up three to five pounds per cow per day once you started feeding from the Harvestore and then it would stay at that level, or did you understand it to mean

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[p. 273] me, but I recall that the structure was installed or actually constructed on your farm sometime the following February, the end of February 1975. Does that sound right to you?

A. It's very close, yes.

Q. And after you had the silo installed on the farm, how soon after that time in February 1975 did you actually put feed into the silo?



A. That following spring, late May or early June.

Q. And what did you fill it with?

A. Haylage.

Q. So this would have been your first cutting of alfalfa in the spring?

A. Yes.

Q. Do you remember how full you filled the structure during that first cutting?

A. I cannot remember.

Q. Well, based on your experience over the years, can you give me an approximation of how full the structure would be after one cutting of haylage?

A. When you look down from the top, you can never see -- I mean, it's so dark down there you don't know where your line is. I have no idea how much we put in there.

Q. Did you put more than one cutting of haylage in the [p. 274] silo in 1975?

A. Yes.

Q. How many more cuttings after that first cutting did you put in?

A. The second and third cutting were put in. I can't recall if a fourth cutting was made that year or not.

Q. Do you remember when you first started feeding out of the silo?

A. I would imagine a few days after we started filling.

Q. What guidelines if any did you follow when you were filling the silo in 1975?

A. We cut the hay early, chopped it very fine, and filled it as fast as we could, I guess. Or we chopped hay all day and filled silo.

Q. And were those all guidelines that Mr. Deutsch had told you to follow?

A. About cutting hay early -- well, these are the things that, yes, I'd say Mr. Deutsch told me that. The brochures told me that.

Q. Do you remember what moisture content you put the feed up at?

A. Anywhere between 35 and 55 percent moisture.

Q. When you first began feeding the haylage out of the

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Q. [p. 276] Right.

A. I can't recall what it smelled like the first days I took it out.

Q. Did you make any sort of observations about the temperature of the feed when it came out?



MR. BIRD: When?

BY MR. SHEPARD:

Q. Right in the beginning, when you first started feeding out of it in 1975.

A. The first days? It was, it might have been a little bit warm, but this was expected to be. But I guess whatever it was, it definitely come out just a little bit warm, yes.

Q. What do you mean when you say it came out a little bit warm?

A. Well, warm to the touch, I believe. Just anytime -- I knew fermentation would be taking place, and so I felt that it was a little bit on the warm.

Q. Did the appearance of the feed change at all during the summer months of 1973 when you were feeding out of it?

A. Yes.

Q. How did it change?

A. Well, it got somewhat darker. Then it turned into [p. 277] a browner color.

Q. When you say browner, can you be more specific about how it looked?

A. It had that brownish color.

Q. Did you notice any other changes in the feed over the course of the summer in 1975, if you remember?

MR. BIRD: In the color?

BY MR. SHEPARD:

Q. Any sort of -- anything you saw.

A. Well, as the color got to where it was in the browner, then the molasses smell would come and the smell of the haylage was -- like I said, the first days there wasn't no smell of haylage. But as it moved on, yes, the aroma, the smell of the haylage, like molasses, and it stayed that same color.

Q. When you say molasses, was it a fermented smell, a pickled smell, or are you describing something else?

MR. BIRD: Wait a minute now. Feed can be like wine. Everybody has a different description of it. You know, you're giving him different adjectives that may mean different things to him than they mean to you.

MR. SHEPARD: I don't want to --

MR. BIRD: Well, you're arguing with

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[p. 280] then. From let's say September of '75 until the end of the year 1975, for the fall months and the first early months of winter, what did you notice about the feed?

A. It had the dark, the brown color and smelled like molasses. It was warm to the touch.

Q. Did the color of the feed change at all during those months compared to the color you had seen during the summer months?

A. When you say summer months, are you talking about the first days that I opened it, started?

Q. Well we talked originally when you said, I believe you said the first few days when you started feeding out of it the feed was greenish color.

A. Yes.

Q. And then we talked about over the course of the summer and you said it started to look brownish.

A. Yes.

Q. I'm asking you now, during the fall of 1975, from September until December, whether the color changed or looked any different to you compared to the color you had seen during the summer months?

A. No.

Q. Did the smell of the feed change at all?

A. No.

Q. [p. 281] Did you observe any changes in the temperature of the feed?

A. No.

Q. Did you see any mold in the feed?

A. You're talking what period now?

Q. Between September and December of 1975.

A. No.

Q. Did you see any spoilage in the feed from September to December?

A. No.

Q. Let's talk now about the period of time from January of 1975 through May of 1975, during the winter and then into the spring of 1976. Did you notice any change in the appearance of the feed during that period?

A. No.

Q. Did the feed look any different to you from January to May than it did in the fall of 1975?

MR. BIRD: I guess you're changing. You said in the spring and now you're going to May?

BY MR. SHEPARD:

Q. Well, I'm not trying to -- I guess I'm using the terms to mean the same thing. I'm talking about the period from, let's say January 1976 until whenever you began filling it again. I'm just [p. 282] using May because that's when you said you thought you had filled it in 1975.

So my question is, during that period from January of '75 to May of 1976 did the feed change, did the appearance of the feed change at all compared to what you had seen in the fall of 1975?

A. No.

Q. Did you notice any changes in the smell of the feed from January until May?

A. No.

Q. It still had a molasses smell to you?

A. Yes.

Q. And the feed still appeared to have a brownish color?

A. Yes.

Q. Did the temperature of the feed change at all compared to the temperature you had observed during the fall of 1975?

A. No.

Q. And so the feed was still warm to the touch?

A. Yes.

Q. Did you see any mold in the feed from January to May of 1976?

A. No.

Q. [p. 283] Did you see any spoilage in the feed from January to May of 1976?

A. No.

Q. Did you empty the silo completely before you filled it again in the summer of 1976?

A. No.

Q. There was still some feed left in the bottom of it when you filled it again?

A. Yes.

Q. And when did you start filling it again, do you remember?

A. Late May.

Q. Do you have any idea how much was left in the bottom of the structure when you began filling it again?

A. I have no idea.

Q. How did the feed that you saw coming out of the Harvestore during that first year of feeding compare to the haylage you had seen on the farm tours that you went on with Mr. Deutsch before you bought the silo?

A. It was very much like what I had seen.

Q. How did the feed from your Harvestore compare to the haylage you had seen in the stave silos when you went on the farm tours with Mr. Von Bank?



A. [p. 284] Very comparable.

Q. How did the feed that you had during that first year of feeding compare to what you had been led to expect by Mr. Deutsch when he sold you the silo?

A. How did the -- repeat that question.

Q. Sure. How did the feed compare to what you had been led to expect by Mr. Deutsch when you purchased the silo?

MR. BIRD: Are you talking about observations now, again?

MR. SHEPARD: Yeah.

MR. BIRD: You're still on that?

THE WITNESS: It compared good to what I expected.

BY MR. SHEPARD:

Q. From what you could see, the feed appeared to be as good as Mr. Deutsch had told you it would be?

MR. BIRD: Well, I'm going to object to that. Now you're using good.

BY MR. SHEPARD:

Q. Do you understand the question?

MR. BIRD: I object to that on the grounds that it's vague as to what you mean by good.

THE WITNESS: Yeah. I believe it was as [p. 285] good as what Mr. Deutsch had told me it would be.

BY MR. SHEPARD:

Q. Did it look like good feed for the entire first year you fed from it?

A. You're talking from what date to date?

Q. From May of '75 when you filled it until May of '76 when you filled it for the second year.

A. Yes. The feed looked, it looked just like I expected it to be.

Q. Did you talk to Mr. Deutsch at all about the feed during that first year that you were feeding out of it?

A. Yes, I'm certain.

Q. What do you remember talking to him about?

A. I know he came several times and we looked at it, we picked it up, we smelled it. Everything looked fine.

Q. Did you indicate to him that you were satisfied with the feed that you were getting from the silo?

A. Yes.

Q. Were you satisfied with the way the silo was operating?

A. Yes.

Q. Did you and Mr. Deutsch talk about anything else during those times when he came to your farm,

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[p. 287] MR. BIRD: What feed?

MR. SHEPARD: The feed that was coming out.

MR. BIRD: The new feed?

BY MR. SHEPARD:

Q. Well, no. I understand, just so it's clear, that you had some feed left in the silo from the previous year when you filled it again in '76. Correct?

A. Yes. Yes.

Q. And I understand that while you were filling, putting a new cutting on top, you were still feeding off the bottom of the previous year's cutting, correct?

A. Yes.

Q. How did the feed appear to you during that time period in the summer of 1976?

MR. BIRD: You're talking about alfalfa that had gone in the year before? Is that what you're talking about?

BY MR. SHEPARD:

Q. Yes. That's --

A. I'd have to say somewhere maybe during July and August when we start getting into the new feeding that there was a few chunks of little mold would [p. 288] come out.

Q. Okay. Up until July or August were you still feeding the haylage you had put in the previous year?

A. Well, by this time it was getting to be a mixing. I can't tell the difference because it all comes out the same color. I couldn't tell you at what point we were feeding one or the other.

Q. Well, during the months of May and June and into July of 1976 how did the feed appear to you that you were seeing coming out?

A. It appeared like it did all winter long.

Q. Did it have the same smell you had observed during the winter and fall?

A. Yes.

Q. Did it have the same temperature or feel to it that you had observed during the winter and fall?

A. Yes.

Q. Now, in July or August what did you observe? And we're talking about 1976 now. In July or August of '76

what did you observe about the feed during that time period?

A. We noticed a few little chunks of mold would come out.

Q. What did the chunks of mold look like?

A. [p. 289] They're just little white chunks about the size of a spoon or something. Not many of them, but there were some there.

Q. About the size of a spoon?

A. They were just little things. Could barely see them, but yea, there was a few little ones there.

Q. What color were the chunks of mold that you saw?

A. A little lighter color, light, maybe white.

Q. How long a period of time did you see these chunks of mold coming out with the feed?

A. I believe probably for about a month, something like that.

Q. And that would have been in July or August?

A. Yes.

Q. Did you see any spoilage in the feed during July or August?

MR. BIRD: Other than the mold?

MR. SHEPARD: Other than the mold.

MR. BIRD: You're asking about what he understood to be spoilage at that time?

BY MR. SHEPARD:

Q. I'm just asking what he saw, yeah.

A. What's the difference between spoilage and mold?

Q. Maybe there isn't any. Did you observe anything other than the mold that you considered to be

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[p. 292] change at all during the spring, winter and spring of 1977?

MR. BIRD: You're talking about alfalfa now, right?

BY MR. SHEPARD:

Q. I'm assuming you put alfalfa haylage in the structure.

A. Yes.

Q. Just so we don't run into a problem later on, was there ever a time between 1975 and 1991 when you put anything in the 25 by 80 Harvestore other than alfalfa haylage?

A. We put corn silage in.



Q. Did you do that more than once?

A. Yes. There was numerous times we put corn silage in the fall on top of the haylage.

Q. Okay. When was the first year you put corn silage in on top of the haylage?

A. Oh, that, I could not give you. I have no idea what year it was.

Q. Well, we were talking just a moment ago about the feed during the latter half of 1976 and into 1977. During that time period had you put any corn silage into the silo that you remember?

A. No.

Q. [p. 293] Did the appearance of the haylage change at all from what you've described to me already during the period of time from January of 1977 until May of 1977?

A. No.

Q. And how did that feed, again, compare to what Mr. Deutsch, what you had been led to expect by Mr. Deutsch and what you had read about the Harvestore silo before you bought it?

A. It appeared to be what I expected.

Q. Were you satisfied with the feed you were getting?

A. I was satisfied with the quality, yes.

Q. Do you remember talking to Mr. Deutsch at all during that second year of feeding about the Harvestore silo?

A. Yes.

Q. What do you remember talking to him about?

A. Well, we had talked about the little white molds, or chunks that came out. And he says that that is the top layer of the silo, that you will see a little bit of that.

Q. Are you talking about this time period in July and August of 1976?

A. Yes. Yes.

Q. And this was after you had seen the chunks of mold [p. 294] that you talked about?

A. Yes.

Q. Did you bring that up with Mr. Deutsch?

A. Yes.

Q. Why did you talk to him about it?

A. Well, I was concerned about the little molds.

Q. Why were you concerned about them?

A. Well, I hadn't seen it on any of the brochures or any of the farm tours, nobody showed me little molds, so I was concerned why I had some in there.

Q. When you saw those chunks of mold how did that compare to what you expected to get from the Harvestore silo when you bought it?

A. Well, with my experience on the farm, I expected that with Mr. Deutsch telling me that that was from the top layer of the silo, I expected, I understood and accepted the reason.

Q. But before you talked to Mr. Deutsch, when you saw the mold, is that something you had expected to see based on what you had been told and what you had read about the Harvestore?

A. No, I didn't expect that.

Q. And tell me as best you can, and I know this is a long time ago, but tell me as closely as you can what Mr. Deutsch told you when you talked to him [p. 295] about the mold.

A. Well, he was not concerned, because that's a very -- I had the understanding that that was a common thing; you're going to see this layer sometimes between fillings of just a very light, very light mold.

Q. Did he explain to you or tell you at all why it was common to see a layer of mold between the fillings?

A. Well, it's when you put the last of it in, the way he explained it, you close the doors and the hatch is on top. And there is a little oxygen in there and it has to turn into harmless gas first, I guess, and so there is a little time period there where there is a little damage.

Q. Did he explain to you how the oxygen got in there through the top hatch that you just talked about?

A. Well, yes. When you're filling that you definitely, when you close the doors the top of the silo is still full of air until you close the door. I understood that, yes.

Q. Do you remember anything else he told you about the mold that you talked to him about at that time?

A. No, I cannot recall anything else.

Q. Did you show him the feed yourself? Did he come [p. 296] out and actually look at it?

A. At what point?

Q. That July or August time period of 1976.

A. I believe I did not show him the chunks. I don't believe he was out on the farm just on those days, no, or during that period.

Q. Did you talk to anybody else about the feed when you saw those chunks of mold in July or August of 1976?

A. No. I did not talk to anyone else then.

Q. Did Mr. Deutsch tell you or suggest to you that you do anything differently when you were storing your feed when you told him about those chunks of mold?

A. No.

Q. I'm not quite sure where we left off, but from say September of 1976 until December of 1976 -- maybe you already told me this.

MR. SCHMITT: I think you're on the winter and spring of '77.

BY MR. SHEPARD:

Q. Just so I'm clear in my own mind, during that period from September of '76 to December of 1976 did the appearance of the feed change at all compared to what you had seen before you saw the mold?

A. [p. 297] No.

Q. And from the period of January 1977 until May of 1977 what did you observe about the feed?

A. I believe maybe as it got real close to spring we probably did see just a little more mold, because that spring we did run it empty. We went empty before filling.

Q. When did you see the mold in the spring of 1977, as best as you can recall?

A. It was just the last week or so before it went empty.

Q. And what did the feed look like during that time period?

A. Up to that time period it looked like it normally did. Up to it. And then during that time period it was a little bit darker with some more white chunks.

Q. When you say it was a little bit darker, how would you describe the color of it?

A. Well, just a little darker brown.

Q. And what did the mold look like?

A. Little white chunks.

Q. How big were the chunks?

A. Oh, they were very small, very small.

Q. Do you remember when you emptied the silo that [p. 298] year?

A. It had to be about two weeks before the silage was coming in, I'm very certain.

Q. Would that be sometime roughly in May then?

A. Yeah. Early part of May maybe. Early May.

MR. BIRD: Where are we at? We're in May of '77 now?

BY MR. SHEPARD:

Q. Right. When you saw the mold in the feed in that last week of feedout in May of 1977 did you talk to anybody about the feed then?

A. I believe my serviceman or my salesman was out then, yes.



Q. Was that Mr. Deutsch?

A. Mr. Deutsch.

Q. What did you say to Mr. Deutsch when he was out there?

A. I told him, I showed him the feed, what was coming out. And he explained that that was the end of the silo coming out and that's what happened, because about a week later it was empty.

Q. Did he tell you anything else about the feed?

A. Well, no. The molasses smell wasn't there just at the end no more. That's all we talked about. No, he didn't say anything else.

Q. [p. 299] How did the feed smell during that period at the very end?

A. It had sort of a musty smell.

Q. How did that, the feed at that time that you showed to Mr. Deutsch, compare to what you had expected from the Harvestore when you bought it?

MR. BIRD: You mean the moldy, musty feed?

BY MR. SHEPARD:

Q. Right.

A. I guess I did not expect that.

Q. Did Mr. Deutsch tell you anything else about the feed during that time that you remember?

A. No.

Q. Did he make any suggestions to you about the way you were using or managing the silo?

A. No.

Q. Did you fill the silo again in May of '77 with alfalfa haylage?

A. Yes.

Q. Do you remember how many cuttings of haylage you got in 1977?

A. I cannot remember how many cuttings, but we put a lot of haylage in that year.

Q. How is it that you remember that 1977 was a year

• • •

Q. [p. 301] Did it look just the way it had in the previous two years?

A. Yes.

Q. Had the same brownish color?

A. Yes.

Q. And did it have the same temperature feeling?

A. Yes.

Q. Did it have the same smell?

A. Yes.

Q. During the fall of 1977, from say September to December of 1977, did the appearance of the feed change at all?

A. In what time period?

Q. From say September of 1977 to December of 1977.

A. No. It all stayed the same.

Q. Did you top the haylage off with corn silage in that year?

A. I don't believe so.

Q. From January of '78 to May of 1978 did you notice any changes at all in the appearance of the feed?

A. There was a few times in between there where we'd get just a few little chunks of mold, and then it was gone again. And then towards the spring we went through the same thing we had done the year before for a week or so. But otherwise, through [p. 302] the winter it stayed the same until just the last, the very last, we had some little mold.

Q. Did you have any -- I thought you said you saw some little chunks of mold somewhere along that time period before you got to the last week. Is that right?

A. Yes.

Q. When was that, do you remember?

A. Oh, I have no idea. It was -- I could not tell you what periods or what time it was. It was during the winter when just a few little chunks come out.

Q. How long did you see those little chunks of mold in the winter?

A. Just a few days and then it was gone.

Q. And after those few days the feed returned to its normal appearance?

A. Yes.

Q. And what happened in the spring when you got to the end of the feed?

A. The last maybe two weeks it got very musty and we seen a significant amount of molds.

Q. When you say significant amount of mold, was it more mold than you had seen the first two years?

A. No. The first, not the first two years, because the first year we didn't see any mold. Repeat what [p. 303] you just asked me.

Q. Okay. I thought during that --

A. First year we didn't go empty, so we didn't see any molds. Second year and the third year are about the same.

MR. BIRD: You're going from June to June on your years, right?

BY MR. SHEPARD:

Q. Yeah. I can rephrase the question. Was it more mold than you had seen at the end of the first two cycles of feeding?

A. At the end of the second -- okay. At the end of the first -- about the same.

Q. Okay. But how long did you see the mold in the feed during that time?

A. I thought we were talking about the end of the silo now.

Q. Right.

A. Oh. I'd say just about two weeks, just before it went empty.

Q. And the feed had a musty smell during that time?

A. Yes. Yes.

Q. Did the, color of the feed change at all during that time period?

A. Well, it was much darker and, much darker brown, [p. 304] yeah.

Q. Did you notice anything about the temperature of the feed during that last two weeks?

A. No.

Q. What did you do with the feed at the very end, that last two weeks?

A. Well, I'm positive that when it got to the point where it was getting pretty bad we hauled it -- we had maybe a load or two, manure spreader, one or two loads that we hauled out in the field.

Q. When you said -- how many loads of feed did you haul out to the field that year?

A. Well, two manure spreaders full, I believe.

Q. In 1977, the previous year, did you feed all the feed out, or did you have to throw some out?

A. We threw some out that time, too. We went in and cleaned out the silo and there was some moldy chunks in there that we threw out.

Q. How much do you remember throwing out the previous year?

A. I cannot remember the amount.

Q. Was it more or less than two manure spreaders, if you remember?

A. Not more. Somewhere in there.

Q. And in 1976, in July or August that first year, did

...



[p. 310] or the following year I cannot pinpoint it out.

Q. Well, whether it was in the spring of 1979 or the spring of 1980, can you tell me what you observed the year when you had apparently more spoilage than you had had the preceding years?

A. Well, the one year it got quite spoiled at the end, but much sooner than it normally did. It was much darker and much more mold.

Q. And this was in the spring of either 1979 or '80?

A. Well, it's -- you could put a bunch of years together. I can't pinpoint if it was this year or that year or maybe the next year, but I know there was years we had more damage in the spring than we had other years.

Q. But it was somewhere in that '79, '80 time frame?

A. Or maybe '81.

Q. Or '81?

Q. In an area, yes.

Q. When you said it spoiled sooner, when do you recall observing spoilage that year?

MR. BIRD: I think he said there were some years. Now you're asking him to specify a particular year.

MR. SCHMITT: He did indicate there was one year that he had -- that was his phrase, "one [p. 311] year."

MR. BIRD: I think if you read his answer back he said there were some years where he had more spoilage.

MR. SCHMITT: Later on, but when we got into this reference he referenced one year.

MR. BIRD: I don't know if that's true or not, but you can go ahead and answer.

THE WITNESS: Are you talking of a certain year or in that time frame?

BY MR. SHEPARD:

Q. Well, I thought I understood you to say that somewhere whether it was 1979 or 1980 or 1981, somewhere around in there you remember a year where you had more spoilage than you had had in the previous years.

A. Yes.

Q. Was it just one year or were there more than one years in that time period where you had --

A. I'd say one year for certain.

Q. And whatever that one year was, whether it was 1979 or 1980 or 1981, tell me when you first saw the spoiled feed that year.

A. It was toward spring. I'd say very much around in April.

Q. [p. 312] What did you see in the feed in April of that year?

A. It was dark, a very dark, and a lot of mold.

Q. When you say very dark, can you describe the color of it?

A. No. But it was darker than what I was normally used to feeding.

Q. Was it dark brown or was it black?

A. Dark brown.

Q. And what did the mold look like that you saw during that time period?

A. It was more consistent. We had more of it coming out at a time.

Q. Were there bigger chunks?

A. Yes, I would say there was probably some bigger chunks in there.

Q. Do you recall how big the chunks of mold were?

A. No, I could not recall how big they were.

Q. —And was this also in about April of that year?

A. Yeah.

Q. What color was the mold that you saw?

A. Light and white. Grays.

Q. When you say there was more of it or it was more consistent, did you see it every time you fed from the silo during that time period?

A. [p. 313] Well, that time period is about the time that we shut it down and we hauled the rest of it out in the field that one year. We did not feed it to the cows no more that spring.

Q. What, as best you recall, what time of year was it that you shut it down?

A. Well, in April.

Q. What did you do with the feed that was still in the silo?

A. It was hauled out to the field.

Q. How much feed did you haul out to the field?

A. We hauled for two days. But how many loads, I'd say maybe a dozen manure spreader loads.

Q. Were you involved in actually hauling the feed out to the fields?

A. Oh, yes.

Q. Was there someone else that was working with you?

A. Yes. There was a hired man there.

Q. Do you remember who it was?

A. Donald Pauly.

Q. Did anyone else help you haul it out to the field?

A. I believe not.

Q. When you were putting the spoiled feed into the manure spreader how did you actually get it from the silo out to the field?

[p. 314] MR. BIRD: You mean, with a tractor?

BY MR. SHEPARD:

Q. Physically. Yeah. I'm just wondering, would you run the feed out the unloader on the conveyors and just right into the manure spreader or how did you actually do that?

A. Yes. That's how we did it.

Q. You would just back the manure spreader up to the

A. Well, we had a conveyor going all the way across the barn that would take the feed to the other side, so we just put a board there and backed the spreader down through the center of the barn and filled it up that way. It would fall off. Sort of plow itself off.

Q. And how much does the manure spreader hold? Do you have any idea what the capacity is?

MR. BIRD: Don't guess.

THE WITNESS: I could not say.

BY MR. SHEPARD:

Q. But your recollection is it was twelve or more spreader loads?

A. Yes.

Q. What did you feed to your dairy cows during that time period after you shut down the Harvestore?

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Q. [319] What did you do after you saw the spoilage in the Harvestore in that particular year?

A. MVBA was called out and they checked the unit out and replaced, I believe, a breather bag, one for certain, and checked out the pressure on the silo, see if it was airtight.

Q. Do you remember who you talked to at MVBA about that problem?

A. I could not say for certain, no.

Q. Do you remember if you talked to Mr. Deutsch about the feed?

A. Well, I'm sure Mr. Deutsch, I did talk to him somewhere in that period, yes.

Q. What did you say to Mr. Deutsch when you spoke to him?



A. I told him about the spoiled feed. We looked at it and he said that they would come out, check the silo, check the breather bags and that they could fix whatever it was that caused it.

Q. Did he actually come out and look at the feed?

A. Yes.

Q. What did he say when he saw the feed?

A. Well, he figured somehow some air must have gotten into the silo.

Q. Did he tell you or say anything to you about how [p. 320] air had gotten in?

A. His question, or conversation was that he thought it was a breather bag, but it had not been checked out yet at that point.

Q. Do you remember who from MVBA actually did the testing or the investigation?

A. No, I could not tell you who it was.

Q. At that point, in any event, they replaced at least one breather bag.

A. My vague memory would say at least one was replaced.

Q. What did they discover in the old breather bag?

A. I have no idea what they found. It was, I believe it had a hole in it or something was wrong. I don't know.

Q. Did you ask the person or people who did the repairs what they had found in the old bag?

A. No.

Q. Did you look at the old bag?

A. I don't believe so.

Q. Did they say anything to you after they replaced the bag, that you remember?

A. They pressure tested the silo and everything was repaired.

Q. Were you there when they did the pressure test?

A. [p. 321] Yes.

Q. What were the results of the pressure test?

A. Everything was fine. It was sealed again.

Q. Did you talk to the people from MVBA while they were doing the pressure testing?

A. I was in and around the barn. I imagine I talked to them, but I have no idea what was the conversation. They were just doing their work, and that's what was going on.

Q. Did anyone from MVBA, whether it was Mr. Deutsch or anyone else, make any comments to you about the way you were using or managing the silo?

A. No.

MR. BIRD: At that time?

BY MR. SHEPARD:

Q. At that time?

A. No.

Q. At any point in time up to this particular occasion that you're talking about, had anyone from MVBA made any comments to you about your management or use of the silo?

A. In what time period are you talking?

Q. Up until the time that you had this breather bag replaced.

A. And you're going back from new?

Q. [p. 322] Yeah.

A. Well, Mr. Deutsch did come down into the feedroom a few times, and Ben Johannes I remember coming down there, and they looked at the feed. They'd pick it up, and there was some comments about maybe a little bit on the dry side or a little bit on the wet side, chopped too fine or chopped too long. Those conversations were brought up.

Q. Well let's go back and find out when you had those conversations. First of all, how many times do you recall having that kind of a discussion with Mr. Deutsch?

MR. BIRD: You mean over the whole period?

MR. SHEPARD: From 1975 up until the time the breather bag was replaced.

MR. BIRD: Well, I guess I'm going to object to that because I don't - - he's saying he can't recall precisely when the breather bag was replaced.

MR. SHEPARD: Well, Charlie, he's the one that just gave me this testimony. I'm just asking him how many times it happened.

MR. BIRD: Well, I'm making an objection on the grounds that I think it's an impossible [p. 323] thing for him to answer using those constraints. If you think you can answer it, go ahead.

THE WITNESS: How many times? I'd say maybe two, three times.

BY MR. SHEPARD:

Q. Two or three a times before you had this breather bag replaced?

MR. BIRD: Objection. He just answered that.

THE WITNESS: Yeah.

BY MR. SHEPARD:

Q. And to the best of your recollection, when did you have that first conversation with Mr. Deutsch?

A. I could not tell you when, what year it was or what date.

Q. But he told you - - tell me as best you recall what he said to you during that first meeting with him where he commented on your management.

A. When he came to visit the farm we usually walked down into the feedroom. We'd run some haylage out. He'd pick it up and look at it. And a lot of times it looked good and sometimes -- I shouldn't say good, but sometimes it looked fine and then he'd find some, oh, maybe it should be chopped a little finer or chopped a little wetter or chopped [p. 324] a little drier.

Q. Okay. I'm really sorry to do this, but we're talking about -- I realize this is a long time ago, and we went through the first couple of years that you used the Harvestore. And I thought I understood you to say that after each of those first two years that you used the silo when you saw the little bit of mold at the end of the feedstack that you talked to Mr. Deutsch about those observations of mold at that time.

A. Yes.

Q. And I thought you told me that he, Mr. Deutsch, told you that it was just the end of the feedstack and that it was because there was some air that was trapped in the top when you filled it. Is that what you remember?

A. Yes. Yes.

Q. And I thought you told me that in those first two years he didn't make any comments to you about your management or use of the silo. Is that accurate?

A. Well, any comments or use of the silo?

Q. About the way you were using the silo.

A. I'm confused. I don't understand what you mean.

Q. Okay. After the first two years, you'd fed out of the silo two full years.

A. [p. 325] Yeah.

Q. And at the end of each year you had seen a little bit of mold and you talked to Mr. Deutsch about the mold and he explained to you that the mold was caused by air that had been in the silo from when you filled it.

A. Uh-huh.

Q. Correct?

A. Yes.

Q. I thought you had told me earlier that he didn't make any comments to you on either of those occasions about the way you were using the silo. He didn't comment to you that you weren't using it properly.

MR. BIRD: Are you talking about at that time or at any other time?



MR. SHEPARD: I'm talking about the first two years.

MR. BIRD: Well, I'm going to object, because I think you're going from a specific incident to a whole time, from the way you're explaining the question, and I think it's unfair. But go ahead and answer.

THE WITNESS: Up to them first two years I had the understanding that I was doing everything [p. 326] very much correct.

BY MR. SHEPARD:

Q. All right. Then the third year, beginning when you filled the silo in May of 1977, you told me that you saw mold again at the end of the feedout the following spring.

A. Uh-huh.

Q. Yes?

A. Yes.

Q. In the spring of 1978.

A. Yes.

Q. And that was the year you had to haul approximately two manure spreaders to the field.

A. Yes.

Q. Did you talk to Mr. Deutsch about the moldy feed you saw that year?

A. Yes.

Q. What, if anything, did he tell you about the moldy feed that year?

A. That this was the end of the silo and that this was the top layer.

Q. Did Mr. Deutsch make any comments to you at that time about the way you were using or operating the Harvestore silo?

A. No.

[p. 327] MR. BIRD: All right. Now, wait. Again I'm confused, Blake. Are you talking about at this specific time at the end of the year and you're not talking about any visits this guy might have made throughout the year? That's where I'm confused.

MR. SHEPARD: I'm talking about when he saw the mold in the spring of 1978.

MR. BIRD: And that's what your other questions went to.

MR. SHEPARD: Correct.

MR. BIRD: All right.

BY MR. SHEPARD:

Q. He didn't make any comments to you.

A. No.

Q. Now, during the other months during those first three years when you were getting what you thought was the normal feed, did Mr. Deutsch at any time during those first three years come out to your farm and make any comments to you about the way you were using or operating the Harvestore silo?

A. Well, he never said I was doing anything bad. I mean, as far as comments go it was -- I'd have to say no.

Q. Okay. Now, in this time frame from 1979, 1980, 1981, you've told me about one year when you had a [p. 328] much bigger problem with spoilage.

A. Yes.

Q. In April.

A. Yes.

Q. And you had to haul the spoiled feed out in the manure spreader and take it out to the fields, and you did that for two days.

A. Yes.

Q. And when you talked to Mr. Deutsch about that problem did he make any comments to you at that time about the way you had been using or operating the Harvestore silo?

A. No.

Q. At any time between the spring of 1978 and this particular year when you had the bad feed in April, had Mr.

Deutsch made any comments to you about the way you had been using or operating the Harvestore silo?

A. Are we talking about the April that we hauled all this out?

Q. Correct.

A. I can't remember if he did. He stopped by many times and we had little conversations, but I can't remember if that was the year that he said anything or not.

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Q. [p. 330] Okay. I'm trying to find out, when I say did he make any comments to you about the way you were using or operating the silo, what I want to know is did he come out and suggest to you that you either were doing something you shouldn't be doing or that you ought to be doing something different?

MR. BIRD: Are you saying -- well, I think you guys are two ships passing in the night here. He wants to know what these too wet, too dry, too fine times were, and he's calling it operation and management of the silo.

Now, I think he's not including that in the end of the question. Now, if I'm wrong on this, you know -- but let's get beyond this point here. Do you see what I'm saying? He wants to know what those conversations were where it was too wet, too dry, too early or too late, whatever.

THE WITNESS: Yeah. And I can't pinpoint the year or the date or the month down that he said that.

BY MR. SHEPARD:

Q. Was it at any point during the first three years?

A. I don't believe so.

Q. Okay. So it was sometime after June of 1978, or thereabouts.

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[p. 332] feed being too long or too short or too wet or too dry, what exactly did he tell you?

A. He didn't tell me anything. He looked at it and he thought maybe this was - - he'd pick out a couple of pieces and he thought this was maybe a little bit too long. All he was doing was trying to tell me that maybe you should check your chopper and make sure everything is good and sharp. In other words, he was keeping me on my toes that I kept on doing - - that's what my feelings was at that time.

Q. You understood that what he was telling you to do was just keep doing what you were doing and keep paying attention to your management?

A. Yes. I believe that's what - - yes. That was my understanding.

Q. After he made that comment to you, did you follow those suggestions that he gave you?

A. Well, I was more observant of it as far as keeping the knives sharp and chopping it at a closer moisture than

what we wanted it to be. Make certain it didn't get too dry or anything like that, yes.

Q. And was there another conversation with Mr. Deutsch where he commented on the way you were putting the feed up or managing the silo, other than this one

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[p. 334] THE WITNESS: No, I have no idea at all.

BY MR. SHEPARD:

Q. Well let me try this. Was it in or around 1980?

MR. BIRD: Objection. Asked and answered.

THE WITNESS: I have no idea.

BY MR. SHEPARD:

Q. Was it around 1985?

MR. BIRD: Objection. Asked and answered.

THE WITNESS: I can't pinpoint any year. All I know is that over the years he came down there and occasionally, once in a while, he'd say, well, it should be a little wetter or just a little bit finer.

BY MR. SHEPARD:

Q. Do you recall, whenever these conversations took place, do you recall specifically an occasion where he told you it should be a little bit wetter?



A. Yes. There was some conversations that I should put it up a little bit wetter or try to keep it a little wetter.

Q. Now, up until that time had you always been careful to try to follow the moisture recommendations - -

A. Yes.

Q. [p. 335] - - as closely as you could?

A. Yes.

Q. And after he made the comment to you that the feed should be put up perhaps a little bit wetter, did you pay attention to make sure that you followed that recommendation from then on?

A. Yes. I tried. Yes.

Q. And when he made these comments to you, were you having problems with your feed at that time?

A. No.

Q. And did you understand that these conversations were simply comments made by Mr. Deutsch to remind you to follow the same management guidelines you had been trying to follow all along?

A. Yes.

Q. And you did that from the time he made those comments until you stopped using the silo.

A. Yes.

Q. After this incident where the breather bag was replaced, when did you start filling the silo again?

A. At harvest time.

Q. The end, of May?

A. Usually whenever the first prebud stage we start cutting hay. It varied every week - - or every year [p. 336] it would vary by maybe a week.

Q. What did you notice about the quality of the feed the following year after you had the breather bag replaced?

A. Everything returned to very normal.

Q. And over the course of that year did you make any other observations about the feed that were different than the feed you had during those first few years you used it?

A. No. I'd say it was very consistent to what I was used to seeing.

Q. At the end of that year following the time when you had the breather bag replaced, how was the feed at the end of the year?

A. We had just a small amount of spoilage that we cleaned out of the silo again.

Q. Do you recall how much spoilage you had that year?

A. It's hard to say that year, but - - I'm not going to guess, but maybe one spreader load.

Q. That was the spreader load you had to haul out and dump in the field?

A. Yes.

Q. After you had that spoilage that year did you talk to Mr. Deutsch about the feed that year?

A. I would imagine, yes. I can't recall what was said

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A. [p. 338] I'm sure I have.

Q. And for the record, this appears to be a service invoice from MVBA addressed to you, is that correct?

A. Yes.

Q. And the invoice shows apparently a replacement of a breather bag in the 25 by 80 foot Harvestore, is that right? I'm looking over here on the left where it says, "Changed bag in 25 by 80"?

A. Yes.

Q. And the date here is June 28, 1982.

A. Okay.

Q. Now, does this document relate to the incident we were talking about a few moments ago, when you had the breather bag replaced in the 25 by 80?

A. I would say yes, it is.

Q. Okay. And so it's clear, the event that we were talking about where you had the breather bag replaced occurred in 1982. Does that appear to be the case?

A. Yes.

Q. And that incident where you had moldy feed in April where you had to haul the twelve spreader loads of feed into the field occurred in April of 1982. Would that be right?

\* \* \*

[p. 348] let's say up till 1990. Do you recall any specific observations about the feed from 1984 to 1990?

A. Generally speaking, I'd have to say that I did not observe any change in the feed.

Q. And by that do you mean that you didn't see any mold or spoilage during those years?

A. Well, there was, occasionally in the spring we would see just a little bit when we emptied out. And then maybe during the winter or during the year we'd see a little bit, but it was, it was, I thought, insignificant.

Q. So from 1984 to 1990 the feed - - I'm going to try to just state what I understand and if I misstate it, you tell me. I'm just trying to summarize, so we don't have to go through this year after year after year.

1984 to 1990, would I be correct to say that the feed generally appeared to be brownish and that you did not observe mold until the spring, the very end, last week or two, when you would have some mold and spoilage?

MR. BIRD: Objection. That's not what he testified. He said he'd see a little bit throughout the year.

[p. 349] BY MR. SHEPARD:

Q. If I've misstated that, you tell me how I'm wrong.

A. Throughout the year we would occasionally see, it would only be for a short time, we would see just little chunks of mold, very little, for a short time. Then it was good again for a long time and then in the spring when the silo emptied out, we'd have maybe a load. We always swept our silo out every spring, cleaned it out, and maybe there was two loads some years. I don't know.

MR. SCHMITT: Can I have that read back, please?

(Answer read.)

BY MR. SHEPARD:

Q. And what you've just described is what you recall observing of the feed from this time period of 1984 to 1990. Am I correct about that?

A. Yes.

Q. And that would be consistent with every year you used the silo up until 1990, with the exception of the one year where you had the problem in April where you had a whole bunch of mold that you had to cart out into the field.

A. Yes.

MR. SCHMITT: The drought year.

BY MR. SHEPARD:

...

Q. [p. 361] Towards the end of April?

A. Yes.

Q. What did the pieces or chunks of mold look like?

A. They looked like they - - very small, just a few little white chunks. No more abnormal than we've seen other years.

Q. And how big were the chunks of mold that you saw?

MR. BIRD: When?

MR. SHEPARD: In April.

MR. BIRD: Well, where is he looking. That's the point I'm trying to make.

BY MR. SHEPARD:

Q. Tell us where you saw these chunks of mold.

A. In the conveyor, after it was coming out of the unloader.

Q. And how big were the chunks of mold that you saw on the conveyor?

A. Well, they could range from a quarter to maybe a half a dollar.



Q. And how did that, the appearance of the feed then compare to what you had seen in the Harvestore the previous Aprils that you had been feeding out of the Harvestore?

A. Very comparable.

Q. So in those previous years you had seen chunks of [p. 362] mold varying in size from the size of a quarter to the size of a half dollar?

A. Are you talking about previous years now?

Q. Correct.

A. I thought we were done with previous years.

Q. Well, I thought so too, but you're telling me that in April of 1991 you saw chunks of mold that were the size of, anywhere from the size of a quarter to the size of a half dollar.

A. There was a few of them in there that big, yes.

Q. And that was no different than what you had seen in the previous, all the previous years that you'd been feeding from the Harvestore.

MR. BIRD: Other than that one year, he's testified.

MR. SHEPARD: Other than the year when he had 12 loads of feed that he had to throw out.

THE WITNESS: Yes. It looked very much familiar to what it had always looked. And the amount of mold coming out looked very much the same.

BY MR. SHEPARD:

Q. And this was the same that you had observed roughly in 1976.

A. '76, it was not emptied out.

Q. [p. 363] Well, it was the same as the feed you observed when you got to the end of the feedstack in the summer of 1976.

A. Yes.

Q. And it was the same as the feed you saw at the end of the year 1977.

MR. BIRD: I'm going to object. It's repetitious. I'm objecting. He's already said it is. I mean, how many times you got to ask him?

BY MR. SHEPARD:

Q. Was it the same as it had been in all those years?

MR. BIRD: I'm objecting. It's repetitious you can answer. This is the last time.

THE WITNESS: Yes, it was the same as what it had looked all those years.

BY MR. SHEPARD:

Q. And that was the case right up until the time that you stopped feeding on May 1st of 1991?

A. Yes.

Q. Did you see anything else in the feed in April of 1991 that you had not seen in previous years.

A. After it came out of the unloader?

Q. Yes.

A. And the question was what?

Q. Did you see anything else in the feed in April of [p. 364] 1991 that you had not seen in all the previous years you'd been using the Harvestore?

A. No.

MR. BIRD: Coming out of the unloader.

BY MR. SHEPARD:

Q. Coming out of the unloader.

A. No.

Q. Did you see anything about the feed other than out of the unloader that you had not seen in previous years?

A. Repeat that question again.

Q. Did you see something in the feed somewhere else in 1991 that you hadn't seen before?

A. In the feed.

Q. In the feed.

A. But not out of the unloader. Other than the unloader.

Q. Yes.

A. Yes.

Q. What was that?

A. I seen mold.

Q. Where did you see that?

A. Inside that silo.

Q. You want to take a break?

A. Yes, please.

Q. [p. 365] Let's go off the record.

(Off-the-record discussion.)

BY MR. SHEPARD:

Q. Mr. Klehr, I apologize. And I know this is all upsetting to you and I apologize. And if at any time you

want to take a break, be sure to let me know and we'll stop. Okay?

A. That's fine. Okay.

Q. You just mentioned a moment ago that at some point in April of '91 you looked somewhere, either inside the silo or inside the unloader, and saw some mold, is that correct?

A. That's correct.

Q. Okay. Tell me where you looked, where you saw that mold.

A. Well, that morning Bill Olson was scheduled to come out. He was going to be out to the farm about 11 o'clock. And I told him I'd have the access door open so that we could take pictures of the silage unloader mixing feed.

I had an ice chisel there on the farm that was probably about four feet long. And I took the access door off and I started chopping some silage away so I could see inside that silo. And I chopped for probably an hour and a half. I made a [p. 366] hole that -- the arm was at the door at the time and so I left it fall down and then it would come out.

And so I kept on getting it away from there. And it took me about hour and a half to two hours, and finally I got to where I could see inside that silo.

Q. So you had the access door open and you were chipping through the feed with some sort of a chisel or something?

A. Yes.

Q. And how far into the silo did you get chipping away with the chisel?

A. Well, I probably got three and a half feet, somewhere in there. Three and a half, maybe four feet in.

Q. And what did you see when you got in there?

A. Well, I had a flashlight at first. And it wasn't, it did not give me much light, so I went up to the house and got a spotlight off the back of the house. And I grabbed my little trouble light and plugged it in and screwed the spotlight in there.

And I put that spotlight in there and it was the ugliest thing you wanted to see.

Q. I'm sorry?

A. [p. 367] It was the ugliest thing you ever want to see.

Q. Tell me as best you can what you saw when you looked in there.

A. There was mold hanging all over the silage.



Q. When you dug in through the access door, did you get, did you dig all the way in till you got to the dome or the cavity inside there?

A. Yes. Yes.

Q. So you had worked your way through the feed on the outside of the structure and had dug into the dome area.

A. Yes.

Q. And what you saw was mold inside the dome?

A. Yes.

Q. And can you explain to me what the mold looked like?

A. It had every color you could think of. It was gray, different shades of gray. There was a spot up there about the size of a good beach ball that was just solid gold. I mean, it was gold.

Q. Solid gold?

A. Gold color, yes.

Q. And do you remember anything else about what you saw that day?

A. No. No. That was, that day I seen all the molds, [p. 368] and that was about all that I seen.

Q. Did Bill Olson come out that day?

A. Yes, he did come out.

Q. And did you show him --

A. Yes, I did show him what I seen.

Q. What did Mr. Olsen tell you?

A. He advised me to shut the thing down and not to feed any more silage out of it.

Q. And was that the last day that you fed from the silo?

A. No. We fed until May 1st, which was two weeks more.

Q. So this date as sometime around the 15th of April?

A. It was the 15th of April.

Q. What was the reason you continued to feed from April 15th to May 1st out of the silo?

A. We had no baled hay left no more at this point and I didn't know where to go to get hay. I had to have some time to locate the hay.

Q. Did you find some baled hay at some point?

A. Well, we started going to the sales barn and buying it up at the sales barn.

Q. When you say the sales barn, is that the name of the location?

A. Well, it's the commission, yeah. Belle Plaine

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Q. [p. 377] Yes.

A. I didn't see Mr. Deutsch for many years. And I was grinding pig feed one day; this was probably in, very possibly the fall of '90. I'm certain it was the fall of '90. And I was grinding pig feed and he came up to visit me then. I mean, he stopped at the farm and we talked by the feed grinder. Then we walked back down towards the barn and looked at the feed.

MR. SHERAN: Fall of '90?

THE WITNESS: Yes.

BY MR. SHEPARD:

Q. And you hadn't seen Mr. Deutsch for several years before that?

A. Mr. Deutsch hadn't been out there for a long time. I didn't know he was still with them.

Q. Did he just show up at the farm?

A. Yes.

Q. What did you talk about with him in the fall of 1990?

A. Well, we talked about the protein cost. I know that was brought up. I had asked Mr. Deutsch that -- he asked

me how the cows were and everything and how production was doing. And then I asked him about, you know, I says, "When we [p. 378] bought this thing you told me that we weren't going to feed much protein." And he says -- I says, "Now," I says, "we are feeding a lot of protein."

And he says, "Yeah. But now your production is so much higher compared to what it was many years ago that you require more protein. All farmers are, because of the genetics and everything, they're getting more milk and so they are challenging with more protein."

Q. Let me back up a minute. You said Mr. Deutsch asked you how your cows were doing and how your production was?

A. Yeah.

Q. What did you tell him?

A. Well, I told him that I wasn't satisfied with the production that I was getting at the time. And that was all.

Q. What did he say to you when you told him you weren't satisfied with your production?

A. He didn't say anything. I would say he didn't say nothing.

Q. What was it about your production at that time that you weren't satisfied with?

A. Well, I thought it should have been higher than what it was.

Q. [p. 379] Do you recall what it was at that time?

A. No, I don't.

Q. Had you complained or expressed your dissatisfaction with your production to anyone other than Mr. Deutsch before that time?

MR. BIRD: I'll object on the grounds that it's overbroad.

THE WITNESS: No. I'd say no.

BY MR. SHEPARD:

Q. Was that discussion in the fall of 1990 the first time you had complained to anyone about your milk production?

A. Well, I really wasn't complaining to Mr. Deutsch. I just told him that I thought my cows should be producing more milk. Yeah, I think that was the first time I mentioned that my production should be higher.

Q. At that time do you remember how much protein you were feeding to your dairy animals?

A. I could not say right offhand.

Q. If we were to go back and look at your records and see how much you were feeding then, do you recall whether you were feeding more protein in the fall of 1990 than you had been feeding to your dairy cows in previous years?

[p. 380] MR. BIRD: I object on the grounds that it's vague. It's overbroad. You can answer.

THE WITNESS: Yeah. I could not say for sure.

BY MR. SHEPARD:

Q. Did you and Mr. Deutsch talk about anything else with respect to the amount of protein you were feeding to your animals, other than what you've told me?

A. Repeat the question.

Q. When you were talking with Mr. Deutsch about the protein did you talk about anything else other than what you've just told me?

A. I do not believe we did.

Q. Did you have any more discussions with Mr. Deutsch after the fall of 1990?

A. Yes.

Q. When was that?

A. In the summer of '91.

Q. And what was the occasion that you spoke to Mr. Deutsch in the summer of 1991?

A. Mr. Deutsch stopped off at the farm. It was on June 22nd, 1991.

Q. And what was the reason for Mr. Deutsch's visit?

A. I believe just a routine visit.



Q. [p. 381] What did you and Mr. Deutsch talk about that day?

A. I mentioned it to him that we had filed a lawsuit against Harvestore.

Q. Did he say anything to you?

A. We talked for about 15 minutes, yes.

Q. What did he say to you after you told him that you filed the lawsuit?

A. He told me that I was a good farmer, that my management was good, and that my problem was I wasn't filing it fast enough. He told me about this farmer down the road that, that has a lot of hired men and some full-grown sons, altogether about seven guys, and they have big equipment and they fill it very fast. And he told me that that man has always got good feed.

Q. Did you know the person down the road that he was talking about?

A. Yes, I did.

Q. Who was that?

A. John O'Laughlin.

Q. Was this the first occasion that Mr. Deutsch indicated to you that you weren't doing something right with respect to the way you were running the Harvestore?

A. Besides the few times that he told me that I should

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Q. [p. 384] And do you know anywhere I could look to find out what your milk production was in 1974, 1975, before you started using the Harvestore?

A. It should be on the DHIA papers.

Q. Do you know whether the DHIA records still exist for that period of time?

A. I don't know how far they went back. I do not have any records that go back that far. No. Wait a minute. I should say I don't have any records that go back that far.

Q. What happened to your milk production during that first year that you began feeding from the Harvestore silo?

A. The first year?

Q. Right. In 1975 and into 1976?

A. I believe my production went up.

Q. Do you recall how much it went up?

A. No, I cannot recall.

Q. How did your milk production, during that first year you were using the Harvestore, compare to what you had been led to expect when you bought the silo?

A. I believe that it was giving me what I was expecting, an increase in production.

Q. Did you get the additional three to five pounds [p. 385] of milk per day that Mr. Deutsch had told you about?

A. I believe -- I never sat down to figure it out, but I did get an increase in production.

Q. At the end of that first year of using the Harvestore silo, did you feel as though you had gotten what you expected to get in the way of milk production?

MR. BIRD: I'm objecting. Could you read that back?

(Question read.)

MR. BIRD: Didn't he just answer that question? I thought he just answered that question.

MR. SHEPARD: Well, he's told me he got some kind of an increase in milk production, and he hasn't told me how much. And he was made, Mr. Deutsch made a pretty specific statement about what kind of milk production. I'm just trying to find out if -- let me restate the question.

BY MR. SHEPARD:

Q. After using the Harvestore for that first year, did you feel you had gotten an increase in milk production that Mr. Deutsch had led you to expect you would get when you bought the silo?

MR. BIRD: And I objected because I [p. 386] thought he already answered that, Counsel.

THE WITNESS: Yes, I believe I got the increase that I was expected to.

BY MR. SHEPARD:

Q. Do you know what happened to your milk production in 1977?

A. I have no idea.

Q. Do you know whether or not your milk production went up or down or stayed the same after that first year of using the Harvestore?

A. I'm sure it went up and down. Up and down. I don't know the -- I don't know the trend it was going with.

Q. At the time back in 1977, you were receiving DHIA reports every month.

A. Yes.

Q. And those DHIA reports gave you a summary of your rolling herd average, didn't they?

A. Yes.

Q. Were you looking at those records when you got them?

A. To an extent, yes.

Q. And were you looking to see whether or not your milk production was going up or down?

A. Repeat that question?

Q. [p. 387] Sure. As a dairy farmer, were you interested to know whether or not your milk production was going up or down?

A. Oh, yes.

Q. Well, did you have any idea at all, say in 1977, whether your milk production went up or down compared to the previous year?

A. Well, we were in the process of enlarging our herd that year, '77, and so I do not know what the production did up or down. If it did stay the same, it would be expected because of the more numbers, hanging onto maybe some cows that we may should not have hung onto to fill the barn up once it was built.

Q. Well, at the end of 1977 how did your milk production compare to what you had been led to expect when you bought the Harvestore silo?

A. I guess I believe I was getting my production that I should have got.

Q. And in 1978 do you know whether your production went up or down?

A. I have no idea.

Q. At the end of 1978 how did your production compare to what you had been led to expect when you bought the silo?

[p. 388] MR. BIRD: I'm going to object. There is no foundation. He says he doesn't know what his production was. You can answer, if you feel you can.

THE WITNESS: I have no idea. I could not tell.

BY MR. SHEPARD:

Q. Was it your impression at the end of 1978 that your milk production was matching the level of milk production that Mr. Deutsch had led you to believe you could get from the Harvestore?

MR. BIRD: Objection as repetitious. He just answered that same question.

THE WITNESS: I cannot remember.

BY MR. SHEPARD:

Q. If I asked you that same question with respect to 1979, would your answer be the same?

A. Yes.

Q. Would your answer be the same with respect to 1980?

A. And the question is what?

Q. At the end of that year, the end of 1980, did yarmelke production match the expectation you had based on what Mr. Deutsch told you you could expect when you purchased the Harvestore silo?



A. [p. 389] I can't remember.

Q. And would that be your response for '81 as well?

A. Yes.

Q. And would that be your response for 1982?

A. Yes.

Q. Did there ever come a time when you felt that your milk production was not achieving the level you had been led to expect when you bought the Harvestore silo?

MR. BIRD: I'm going to object to that. It assumes certain facts not in evidence.

BY MR. SHEPARD:

Q. You can go ahead and answer.

MR. BIRD: I think it's an unfair question.

THE WITNESS: Repeat the question?

BY MR. SHEPARD:

Q. Sure. Did there ever come a time when your milk production was not what you expected it to be based on what Mr. Deutsch had told you when you bought the Harvestore?

A. No.

Q. One of the other things that you mentioned was that Mr. Deutsch had indicated to you that you could expect more money and more profits from using the

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[p. 397] understood any of these questions.

BY MR. SHEPARD:

Q. Do you understand my question?

A. Repeat it one more time.

Q. Okay. All I'm trying to find out here is, did you have any herd health problems on the farm at any point since 1975 other than, I mean, the typical, kind of run-of-the-mill health problems that every farm has?

MR. BIRD: Are you asking for his--

THE WITNESS: Let me answer that then. Okay. You have to understand that there is more than haylage in my ration. There is more than high-moisture shell corn. There is baled hay, there is corn silage.

So if I did have a problem, I would not for no reason think that it come from the Harvestore, because there is many other things. There is weather, there's crop condition. There's other things that, if there was a problem, there was no reason for me to think that it was the silo.

BY MR. SHEPARD:

Q. There were a number of things other than the Harvestore silo that could contribute to a health

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[p. 399] thing as a period or a year where you don't have anything. Okay. Were there any periods where -- and I understand what you've just said, that you're always going to have some mastitis in the herd. Is that correct?

A. Yes.

Q. Were there any years when you had what you considered to be a disproportionate number of cases of mastitis in your herd?

A. I'd have to say no.

Q. Even now, looking back, are there any periods of time when you believe you had a disproportionate number of cases or mastitis in your herd?

A. No.

Q. Are there any herd health problems that you had from 1975 till 1991 that you now believe were caused by the Harvestore silo?

A. Repeat that question

Q. Sure. Are there any herd health problems that you had from 1975 to 1991 that you now believe were caused by the Harvestore silo?

A. What I know now?

Q. Yes.

A. Yes.

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[p. 401] MR. SHERAN: Blake, how does he define a high somatic cell count? At what level?

BY MR. SHEPARD:

Q. When you refer to a high somatic cell count, what do you mean by a high count?

A. Six hundred.

Q. About 600,000?

A. Yes.

Q. Were there times before 1990 when you had somatic cell counts above 600,000?

A. I'm sure there was.

Q. Do you attribute those periods of high somatic cell counts to the Harvestore also?

A. What I know now? Yes.

Q. When you had -- well, let me ask it a different way. Has anyone told you that the period of high somatic cell count were caused by the Harvestore silo?

A. Yes.

Q. Who has told you that?

A. Dr. Bill Olson.

Q. And did he tell you that in 1991 when he came to the farm?

A. Yes.

Q. Has anyone else other than Dr. Olson told you [p.402] that?

A. No.

Q. Before 1991 when you had periods of high somatic cell counts, did you discuss those with any of your treating veterinarians?

A. Before 1991?

Q. Yeah.

A. Well, let's forward that to, before March 11th I had talked to somebody, in 1991, to the veterinarians.

Q. Who did you speak to before March 11 of 1991?

A. Dan and Steve Kreuser.

Q. When did you speak to them?

A. When?

Q. Yes.

A. March 6th, 1991.

Q. How is it that you remember the date March 6th?

A. Because it was on a Wednesday I went in there because I had high somatic cell problems, and the creamery told me I was supposed to do something about it. And I took my DHIA papers there, and we looked them over and they did some, we talked and discussed it for a while. And then they told me that the following Monday, March 11th, they were going to come out to the farm and pull blood

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A. [p. 412] On and off through the years. We've had the diarrhea or --

MR. BIRD: What was that you said? The what? Diarrhea?

THE WITNESS: Diarrhea.

MR. BIRD: I thought he was asking you about respiratory problems. You on the wrong end?

THE WITNESS: Am I on the wrong end? What you call it in the back end? I don't know.

MR. BIRD: Well, all right.

BY MR. SHEPARD:

Q. When you said respiratory problems, are you talking about problems with diarrhea and that sort of thing?



A. Yeah. We occasionally had some small cases of it, yes.

Q. Do you mean digestive problems or--

A. We had some digestive problems, too. Yes.

Q. Well, let me ask you this just so I make sure I've covered respiratory problems. Were there any problems with, you know, the lungs or the breathing of the animals?

A. No, not that was noticeable.

Q. Tell me what problems you had with diarrhea and the digestive problems.

A. [p. 413] Well, occasionally, once in a while a cow would come in and she would be very loose and the manure seemed to be more on the darker side.

Q. When did you first notice that?

A. Now and then in the barn I seen some cows that seemed to be a little worse than others.

Q. Okay. When did you first notice that?

A. I'd have to say go back a few years. I couldn't say for certain when.

Q. Well, would it be 1980?

A. Yeah. That's possible, somewhere in there, yes.

Q. Well, could it have been sooner than that, earlier than that?

A. No, I think that probably would take care of it.

Q. Was that something you had ever seen in your dairy herd before then?

A. You mean the diarrhea?

Q. The diarrhea and the loose stools?

A. Yes. We seen is occasionally. Sometimes they call it a winter dysentery. In other words, it seems to go through the barn sometimes.

Q. Well, was there anything that you began noticing in 1980 that was worse or different than what you had experienced with your dairy herd before then?

A. No, I'd say nothing that was worse.

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[p. 415] around at that time.

Q. Do you know whether or not there were any records--

A. No, I would not. No, I wouldn't know.

Q. The next thing that I have on my list here that you mentioned in the way of herd health problems was low feed intake. Tell me when you first noticed that.

A. Over the years we'd have cows that went off feed.

Q. When did you first begin to have problems with that?

A. It's been so long I don't remember when it was, but I guess I'd have to say ten years ago.

Q. When you say cows off feed, what do you mean by that?

A. Well, they refuse to eat the feed. It seems like they'd do it for a day and then everything was back to normal again. Just seemed like they kind of went off feed for a day or so and then they --

Q. Did you have a total mix ration mixer?

A. We do now.

Q. When did you get that?

A. In the spring of 1990.

Q. When these cows went off feed was there anything in particular that they would refuse to eat or would [p. 416] they just refuse to eat altogether?

A. I guess they just pretty much refused to eat. Baled hay. They always liked baled hay, but they refused everything else it seemed.

Q. How frequently did you have problems with cows going off feed beginning with, let's say, ten years ago when you first noticed the problem?

A. How frequently?

Q. Yes.

A. Maybe one or two cases a week.

Q. Well, before that time had you ever had any cases of cows going off feed like that?

A. Yes, I believe over the -- yes, I'd say we had some, some cows that went off feed.

Q. Well, did the frequency of these cows going off feed increase beginning ten years ago compared to what your experience had been before that?

A. Yes.

Q. Did you consult with a veterinarian or anyone else about the situation?

A. Oh, we did talk to the feed man about it, mentioned it to him.

Q. Who was that?

A. Mark Koepp.

Q. How do you spell his name?

A. [p. 417] K-o-e-p-p.

Q. Who does Mr. Koepp work for?

A. Prairie Farm Supply in Belle Plaine.

Q. How long was Mr. Koepp your feed man?

A. I'd say maybe half a dozen years, six years.

Q. And when did he stop?

A. No. He still is.

Q. Oh, he still is.

A. Yes.

Q. So you've been using him for about the last six years?

A. Yes, I'd say something very close.

Q. When did you first talk to Mr. Koepp about the problem with the cows going off feed?

A. Well, he used to stop by about once a month. And he did my rations and he would, he'd talk about the amount of feed the cows were eating. And if he thought we were feeding too much of one thing or too much of another, we seemed to make adjustments in the rations then.

Q. When did you first mention to him this problem with cows going off feed?

A. Well, when I first started. I guess I started when he first came onto the job. This was always a thing, to achieve production you had to get a cow [p. 418] to eat a lot of feed, so you do feed a cow all she wants to eat.

Q. When you discussed this with Mr. Koepp what did he tell you?

A. Well, usually the remedy seemed to be you backed off the feed for a day or two and then away they go again.

Q. And is that basically how you treated the problem?

A. Yes. Yes.

Q. And did that seem to work?

A. Unless the cow had a DA problem, that would solve the problem.

Q. Before discussing this with Mr. Koepp did you talk to anyone else about this problem with cows going off feed?

A. There was previous feed salesmen, but I can't remember their names. But they always came in the barn whenever they come for a visit. And that was their job, to balance the ration, and try and balance it so that the cows would eat it.

Q. Well, when you first started noticing that you were having more frequent problems with cows going off feed around ten years ago did you talk to your feed man at that time about it?

A. Yeah. I guess I'm sure I did.

Q. [p. 419] Do you remember who that person was?

A. We've changed feed men. Years ago we used to, every couple years it seemed you'd find a different feed man



come down the road. But to pinpoint which one, I couldn't even tell you right now.

Q. Did any of the feed men that you talked to about this problem ever indicate that the problem was related to problems with the Harvestore feed?

A. No.

Q. Did any of them ever indicate that it was related to the quality of the feed that you were feeding to your animals?

A. No.

Q. Did they give you any indication of why the cows were going off feed?

A. No, they didn't. They would balance the ration, maybe add more buffers and things, make a cow eat more of the feed.

Q. What was your understanding as to why the cows were refusing to eat?

A. I guess I just, just for the simple reason that we thought, well, must have fed her too much. We kind of took everything away and then they just took off again.

Q. Has anyone told you since that time that these [p. 420] problems are related to the Harvestore feed?

A. No.

MR. VICK: Excuse me. I believe you used calves again when referring to cows. You just need to watch that.

BY MR. SHEPARD:

Q. Do you remember ever talking to any of your veterinarians about this issue?

A. The only time that we would talk to a veterinarian about off-feed would be when they had a twisted stomach and you had a sick cow that needed veterinarian care. And then we talked about, well, today she's not eating. She hasn't eaten for two days.

Q. Let's talk about the twisted stomachs for a minute, as long as we're on the subject. When you talk about DAs you're talking about the same thing as twisted stomachs, correct?

A. Yes.

Q. When did you first start having problems with twisted stomachs?

A. Oh, that's many years ago. You'd have to go back to probably when we started with the haylage, or to chopping of fine feeds, the roughages.

Q. And would that have begun around 1975?

A. [p. 421] I imagine around that area, yes.

Q. Have you had those problems before then?

A. No.

Q. Who did you talk to if anyone about that problem when you first started having problems?

A. Well, that was basically with our veterinarian. That was his concern, I guess. That would be the man we talked to.

Q. Was that Dr. Mittelsted?

A. Dr. Mittelsted at first, yes.

Q. What did Dr. Mittelsted tell you about the problem?

A. He didn't -- at that time I don't believe he told me where it was coming from. We didn't know where it was coming from.

Q. Was he the one who told you about the relationship between twisted stomachs and the fine chopped feed? Or was that someone else?

A. I believe it had to be the next veterinarian in line probably, because I don't believe Mr. Mittelsted told us that.

Q. Who was it that told you about the relationship between the chopped, fine chopped feed and twisted stomach?

A. Richard Klimmek.

Q. [p. 422] Do you remember when you talked to him about that issue?

A. Well, he's been my veterinarian probably -- I guess somewhere in the late '70s he started.

Q. Do you recall that he made this association between fine chopped feed and the twisted stomachs sometime in the late '70s?

A. Yes, I believe so.

Q. Have you talked to anyone else other than Dr. Mittelsted and Dr. Klimmek about that problem?

A. Well, over the years every time a veterinarian came to do an operation or something I'm sure we talked about it and what caused it. And I think a lot of them -- every farmer's got different rations, different feeds, so I don't know what they really were tying it to.

Q. Have any of your veterinarians or has anyone else told you that the twisted stomachs are caused by Harvestore feed as opposed to any other form of finely chopped feed?

A. No.

Q. Has Dr. Olson ever indicated that to you?

A. I would say he has not.

Q. And I think we talked about this yesterday, but am I right that you treated the problem of twisted

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[p. 427] with uterus infections. Been a long time.

Q. Did you have some problems with uterus infections prior to 1975?

A. Yes, we had some problems.

Q. Were the problems with uterus infections better or worse or the same after 1975?

A. Well, for the amount of animals we had, I'd say we had more uterus infections than we had before.

Q. So even considering the number of cows you had, you had a higher percentage of --

A. Yes.

Q. -- incidents of uterine infection?

A. Yes.

Q. When did you first begin to have an increase in the number of uterine infections?

A. You'd have to go back many years. I guess I'd say -- it's hard to pinpoint the year. I'd say probably in the early '80s, somewhere there.

Q. Did you talk to anyone about those problems when they arose?

A. I believe I talked to the feed salesman about it, several times, because we always felt that they're lacking some type of a vitamin or something. That's why they are having these problems.

Q. Who do you remember talking to?

A. [p. 428] Well, just about any feed salesman that we had out there. That's usually one question they will ask you before they balance the ration is if you're having these problems, and then they kind of throw in a little bit more of this or a little bit more of that.

Q. Is that something that you talked to your feed salesman about in the early 1980s when you first began to notice this increase?

A. Yes.

Q. Do you remember who it was at that time that you talked to?

A. Right offhand, I couldn't tell you who it was.

Q. What did you do to treat those problems that you had?

A. The veterinarian treated some of them, and then they used to leave me off some medication that I would treat them myself.

Q. What did the vets do to treat them?

A. We call it infuse. They infused some medication.

Q. Do you know what the medication is called that they used?

A. I believe they used Nolvasin and Furacin.

Q. Is that the same medication that they left you?



A. Yes.

Q. [p. 429] Did you understand there to be any sort of a relation between uterus infections and milk production?

A. When a cow has a uterus infection she's usually not feeling very good, and when she's not feeling very good she's not going to milk. So I would have to say there is a correlation, yes.

Q. Did any of your vets or feed salesmen ever indicate to you that this higher rate of uterus infections was related in any way to the feed that you were feeding your animals?

A. Not what I was feeding, but they felt I must be lacking something is probably what is more likely, I guess.

Q. Did any of them ever blame the problem on the Harvestore feed?

A. No.

Q. What vitamins did your feed salesmen add to the ration, if any, to deal with that problem?

A. Always vitamins and minerals, but they always increased the Selenium. They thought Selenium was a big help in that end. And vitamin A, D and E was the --

Q. Did those changes in selenium and vitamins help to address that problem?

A. [p. 430] It does help, yes.

Q. Has anyone else ever indicated to you that those incidents of uterus infections were related to the Harvestore feed?

A. No.

Q. You also mentioned that you had some foot problems. Can you tell me what the foot problems were that you had?

A. The hooves seemed to grow, I don't know, just fast and weird, I guess it was. They seemed to have a lot of foot trouble.

Q. When did you first begin to notice that?

A. We've noticed that for probably the 1980s.

Q. Since around 1980?

A. Yes.

Q. Why was that of concern to you?

A. Foot problems?

Q. Yeah.

A. Well, it tells you how many years that cow is going to be around. If you got a cow that's got bad feet, she's not going to milk good and she's not going to be around very long.

Q. I'm just trying to understand what the relationship is between foot problems and milk production. Is it because the cow won't be comfortable or --

A. [p. 431] It's a big factor because the cows, if they got to stand there, if they're sore on their feet, they don't eat and they won't do a lot of things.

Q. And ultimately then that can have a bad effect on milk production; would that be right?

A. Yes.

Q. Who, if anyone, did you talk to about that problem?

A. I believe the feed salesman was involved in that too a little bit as far as the Selenium and those things. They tried to keep the levels as high as they possibly can in the feed ration.

Q. So did your feed salesman at that time when you first began to notice the problem prescribe additional Selenium?

A. Well, they prescribed maybe several things. There's other minerals too that they all throw in there. I don't know what they all throw in there.

Q. Do you remember who the feed salesman was at the time when you first brought it up?

A. No, I couldn't even begin to know.

Q. Did any of your feed salesmen ever indicate that the foot problems you were seeing was related to the feed in any way?

A. I believe -- well, I guess I can't answer that, [p. 432] because I don't know. Over the years I guess it was never -- no, I'd have to say it was never mentioned that the feed had something to do with the feet problems.

Okay. Yeah. I mean, yeah, they put their minerals and that in, but as far as my homegrown feeds having any effect to it, I don't believe, they never mentioned anything.

Q. Has anyone else ever mentioned that to you, that there was a connection between your homegrown feeds and this foot problem?

A. No one has ever mentioned it, no.

Q. And, I gather from that, no one has ever mentioned that this was related in any way to the Harvestore feed.

A. No one has ever mentioned that.

Q. Did you do anything else to address the hoof problem? Did you hire a hoof trimmer?

A. Yes, we do have a hoof trimmer.

Q. Who is the hoof trimmer that you have?

A. Vic Larson.

Q. When did you first get in contact with Mr. Larson about coming to your farm?

A. The records would indicate it, but I believe probably about ten years he's been doing it now.

Q. [p. 434] Was that something that was arranged by one of your attorneys?

A. I understand that, yes.

Q. What happened when Mr. Scott came out to the farm?

A. Well, we were milking cows yet that morning, and he just walked around the barn and looked at the feet and we had a conversation. He looked at the feet, yeah, and we had conversation, and he probably was there a half hour.

Q. What did you talk about when you had the discussion with him?

A. Just basically the history of the cattle and the history of the health of the cows.

Q. What did Mr. Scott tell you?

A. Well, he looked at the feet and he thought that some of this growth on the hooves come from spoiled feed.

Q. Did you say he looked at the feet or the feed?

A. Feet. The hoof.

Q. Did he tell you why he thought the problem with the hooves was related to the feed?

A. Well, he had some reason, I don't understand what it was, that he could tell that some of these cows had got, somewhere in their life had gotten spoiled feed.

Q. [p. 435] Are you still having a problem with hooves?

A. We still trim yet now, yes.

Q. Is hoof trimming an unusual thing to have on a farm?

A. It's getting to be more common than years ago. Nobody used to do that.

Q. Did Mr. Scott say anything else about the health of your animals, other than what he told you about the connection between spoiled feed and the hooves?

A. He looked at the condition of the cows and, like I say, I cannot say what he said because I do not remember what was talked about.

MR. SCHMITT: You said calves.

THE WITNESS: Did I say that again? Cows. Cows.

BY MR. SHEPARD:

Q. Do you remember anything he said about the condition of the cows?

A. He thought they looked pretty good.

Q. Did he indicate that to you?



A. Yes

Q. Do you remember anything else about your discussion with Mr. Scott?

A. No.

Q. Did Mr. Scott make any sort of connection between

Q. [p. 436] Harvestore feed and the hoof problem?

A. Yes, I believe he did.

Q. I gather he was the first person that ever made that connection?

A. Yes.

Q. Did Mr. Scott make any sort of connection between some of these other health problems that we talked about and the Harvestore feed, such as the diarrhea problem?

A. We basically only talked about the hooves that day. I mean, we maybe talked other subjects, but that would be the only thing that I can remember because I was milking at the time. And we talked about the feet and that was just about everything.

Q. When did you first notice any problem with bad legs?

A. That was many years ago too. We used to get these cows that would get these, it's on the hind leg. They get this lump on the side of the leg or a big bruise, looked like bruises. I don't know where it come from.

Q. This would be bruises on the hind leg?

A. Well, yeah. The joint of their knee would swell up is what it looked like, yes.

Q. When did you first -- can you give me an idea of [p. 437] how many years ago this was? Is this around 1980?

A. Well, I remember when we were adding on to the barn in '77, we had a couple cows in the barn then that had just huge, looked like a great big softball sitting right on that joint there. Because I know the first cow moved into the new barn had one of those things on there.

Q. Had you ever seen anything like that before?

A. I'd have to say no, I guess. No.

Q. Can you give me an idea of how common this problem was with the swelling or bruising on the hind legs?

A. It seems it happened more on the younger heifers when they were brought into the barn, that they would -- oh, I'd have to say maybe, we'd have maybe three, four, five cases a year, something like that.

Q. Did it happen at all with the dairy cows?

A. Oh, yes. Well, yeah, this is the dairy cows. It was a heifer that was ready to calve and we brought him in at calving time. Older cows didn't seem to do it so much as the younger.

Q. And have you continued to have problems with about three to five cases per year since around 1977?

A. Repeat that question?

Q. [p. 438] Yeah. I'm sorry. It's not a very good question I think I'm getting tired. I thought you said that you had about three to five cases a year that you noticed this problem with heifers.

A. When I say heifers, I'm talking about first calf heifers is what I mean. Heifers when they come into the milking barn, yeah.

Q. And has that been pretty much your experience in terms of how many animals you've had with that kind of a problem over the years?

A. Yes.

Q. Did you talk to anyone about that problem when you first noticed it?

A. Well, the veterinarians, we had done surgery on a few of them over the years, and most of the time we just leave it alone. It's been discussed, but nobody seems to know where it comes from.

Q. Has anyone ever indicated to you that it's related to feed?

A. No.

Q. Or has anyone ever indicated to you that it's related to the Harvestore?

A. No.

Q. Why do you think that those problems were caused by the Harvestore?

A. [p. 439] Did I say they were caused by the Harvestore?

Q. Well, I thought when you gave me this list of problems these were things that you thought today had been caused by the Harvestore feed. Maybe I misunderstood that.

A. Well, if you look back now, over what I know now, when I look back over the years and if this was going on all these years, I believe definitely it had a lot to do with the Harvestore feed.

Q. Okay. Why is that?

A. Because maybe there was a lot more spoilage going on than what I thought was going on.

Q. Well, is there some relationship between spoilage of feed and this leg condition that you're talking about?

A. I can't say yes or no, but all I know is I had more foot problems and more leg problems and more health problems than I had before.

Q. Did you discuss this issue of bad legs with Larry Scott when he was on your farm?

A. I'm sure it was talked about. Like I say, he did a lot of observing. I don't remember what he all talked about. He looked at my DHIA records, the reproduction records,

which is all on the DHIA sheets. And what he came to a conclusion, I really [p. 440] couldn't say.

Q. You also mentioned that you thought the cows were too thin. Do you remember that?

A. Yes.

Q. When did you first notice that the cows were thin?

A. I guess I really notice it now, presently. When my cows are healthy, they're fleshy and they carry a real good condition. Before that, my cows seemed to be on the thin side.

Q. I believe when we were talking about your experience with the using the milk parlor you indicated that you thought the cows were thin when they went in, but that they got thinner during the time that you were using the milk parlor.

A. Yes. It seemed to be, yes.

Q. And was that true in 1977 and '78, the first time you used the milk parlor?

A. Yes.

Q. And was that also true in the summer of 1988, the second time that you used the milk parlor?

A. That the cows seemed to be thinner?

Q. Yes.

A. Yes.

Q. And was that also true in 1990 when you used the milk parlor for the third time?

A. [p. 441] Yes.

MR. VICK: I'd like to take just about a two-minute break. It appears to me that Mr. Klehr is getting a little bit glazey-eyed. I want him to maintain his attention.

MR. SHEPARD: That's fine.

(Brief recess.)

BY MR. SHEPARD:

Q. Mr. Klehr, we've got 17 minutes to go here. Did you ever talk to anyone about your observations relating to the thinness of your cows?

A. The feed salesman. There was conversation all the time. They usually looked at the condition of the cows, and then from there they would tell you if you needed more grain or more haylage or more protein, or whatever they thought the ration was, to adjust for the cows.

Q. Do you remember whether any of the feed salesmen confirmed or made a comment to you that they thought your cows were unthrifty or thin?

A. Yes. I'm certain that they observed the unthrifty cows or the thin cows, yes.



MR. BIRD: Hold on. Can I just have a minute with him?

(Off-the-record discussion.)

[p. 442] BY MR. SHEPARD:

Q. Do you recall when it was that your feed salesman first commented to you that they thought your cows looked unthrifty?

A. Well, that goes back many years. It will depend on the lactation of the cow. And they don't only look at the condition of the cow, they look at the pounds of milk the cow is giving, they look as to how they're holding their lactation. And so they take a lot of things into consideration when we discussed this problem of a thin cow. So it goes back to probably when you had your first feed salesman, because that's what he's there for.

Q. So would this have been back to sometime, I mean, would it have gone back to before 1980 sometime?

A. I believe it would be in that range there somewhere, yes. Probably back -- as far as the consulting feed salesman and that, it probably went back before that.

Q. And you make a good point there. When you're talking about thriftiness of a cow, a cow's weight can depend on the cow's production and where she is in the lactation cycle and that sort of thing.

A. That's right.

Q. But as I understand it, what you were saying is [p. 443] that the feed salesmen, when they considered all of these various factors, expressed to you a comment that they thought your cows were less thrifty than they should have been?

A. Yes.

Q. Do you remember who those feed salesmen were who made those comments to you?

A. I would say Mark Koepp would have been one of them.

Q. And that would have been sometime in the last six years?

A. Yeah. Yes.

Q. And would there have been someone -- I mean there would have been someone before then. Do you recall who it would have been?

A. Oh, it's hard to say, because years ago we used to jump feed stores more often. We probably, a lot of them have gone broke or closed up, closed the doors, and so we probably switched once a year maybe. It wasn't so consistent as what we are now. We seem to be sticking with -- I really couldn't say who I have talked to before that.

Q. Do you recall any of your feed salesmen or anyone else ever telling you that there might be some relation between the unthriftness of your cows and [p. 444] the feed from the Harvestore silo?

A. No.

Q. Did anyone ever indicate to you what they thought was the cause of the unthriftiness?

A. No. At the time they thought they'd increase a little bit more grain or a little bit more feed. They're not getting enough into them. They thought in that range, yes.

Q. What is the reason that you now believe that those problems were caused by the Harvestore?

A. What I see now is, I believe that the feed value that was in the Harvestore the cows did not utilize up the way they should have.

Q. And why do you say that?

A. Because maybe the feed value wasn't there to be utilized.

Q. Why is it that you question whether or not the feed value in the Harvestore feed was there back in that time period?

A. Because -- repeat that question?

Q. Yeah. I'm sorry. It wasn't a very good question. Is there some reason you now believe that the feed value from the Harvestore feed was lower than it should have been?

A. Well, now, the only thing I've changed is to remove [p. 445] the haylage and gone to all baled hay. And my cows do hold their condition very well.

Q. Had you ever had a problem with unthriftiness in your cows before 1975?

A. I'd have to say not.

Q. Okay. I've only got two things left on this list. One of those is rough hair coats and the other is dull eyes. When did you first notice that your cows had rough hair coats?

A. My cows never -- I guess you look back now over the 15 years, what I see now what's going on in my cows now, the shininess, the slick hair coats, that was something I never seen in my barn for a long, long time.

Q. Well, was there a difference in the appearance of your cows after 1975 than there was before 1975?

A. Yes. I believe so, yes.

Q. And after 1975 I guess you're telling me that the cows appeared to have rougher hair coats than they had before 1975?

A. They just did not shine or look as nice as they do now or as nice as they did before 1975.

Q. Did you ever talk to anyone about that?

A. That fell under the feed nutritionist guy, and I'm certain the thin cow -- the rough coat, with the [p. 446] dull eyes, was all tied in with the thin cow.

Q. Do you recall discussing this with your feed salesman sometime back in the late '70s?



A. I'm certain that every time they came out for a visit we went over the ration and they basically would check the cows, look at the volume of milk. And they would take into consideration the thinness and the roughness of the cow, that they knew that these cows were still lacking something.

Q. And you had discussions with one or more of your feed salesmen back in the late '70s or early '80s, sometime in that time frame?

A. Oh, yes, I'm certain I did.

Q. Do you remember who?

A. No, I would not remember.

Q. And finally -- well, let me ask one more question about the rough hair coats. Has anyone ever told you that the rough hair coats were caused or related to feed from the Harvestore silo?

A. No.

Q. Okay. Dull eyes. When did you first notice a problem with dull eyes?

A. It's like everything else; now, when you see a healthy cow and you look back, a healthy cow's eyes just shine. The cows' eyes never had that gloss [p. 447] to them that they have now.

Q. And were the eyes of your cows shinier or brighter before 1975 than they were afterwards?

A. I would say so, yes.

Q. And again, did you discuss this issue with the feed salesman at some point when you noticed the problem?

A. Well, yes. That was, like I say, when they come out, that was like a health check they did on the cows. And so that was all tied into their body condition. Maybe not individually talked about the eyes, but they looked at the condition of the cow, they looked at the nose to see if the nose was runny and if they had snotty noses or if they had any problems. That was sort of like their duty, yes.

Q. Did you talk about either the rough hair coats or the dull eyes with Larry Scott when he was visiting your farm?

A. I don't believe we touched on that at all.

MR. SHEPARD: This might be a good place to stop.

MR. VICK: Is that all right with you?

THE WITNESS: There is one more issue I would like to talk about on the health problems.

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[p. 459] record.

(Off-the-record discussion.)

BY MR. SHEPARD:

Q. Mr. Klehr, was there a reason why you used bulls for cleanup during these two or three different periods that you recall?



A. Well, we had some cows it just seemed we could not get settled AI, and then we ran the bulls sometimes with the heifers for a short period of time.

Q. So you used the bulls to breed the heifers and to do cleanup on the dairy cows?

A. Right.

Q. Before 1975 when you started feeding out of the Harvestore, had you used AI or did you use bulls or both?

A. We used very few bulls, mostly AI.

Q. Do you recall a period before 1975 where you used bulls for breeding?

A. I was quite small. I was probably like 15, 16 years old. My dad built a bull shed behind the barn, a separate building for them. And so that was probably 32 years ago.

Q. After you moved onto the farm in 1969 until 1975 when you started feeding out of the Harvestore, did you use a bull for breeding purposes during that [p. 460] time period at all?

A. From what time period?

Q. From '69 until 1975?

A. I would have to say no.

Q. Can you give me an idea of when you first began using a bull for cleanup?

A. I could not tell you the years. The breeding books will show exactly when the bulls were around.

Q. Where did you purchase the semen that you used for artificial insemination?

A. From about three or four different AI studs, ABS, 21st Century, earlier it was MVBA. Years ago we used to breed the Curtis.

MR. BIRD: Who?

THE WITNESS: It was Curtis, not Curtis candy, but it was Curtis Breeding. And Select Sires. There is a couple studs now that sort of merged together --

MR. BIRD: Wait a minute now. Are you answering his question or are you going on to something else?

THE WITNESS: No. Still trying to get names of different, but like Sire Power is another one, too.

BY MR. SHEPARD:

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[p. 463] come out and sell you the semen?

A. Just come out and sell the semen.

Q. You mentioned, I think, last week that you did have some problems with reproduction or breeding at some point over the years. Is that accurate?

A. Yes.

Q. When did you first begin to have problems with reproduction?

MR. BIRD: I wouldn't guess. If you can't recall, it's in the records.

THE WITNESS: No. I'd be guessing.

BY MR. SHEPARD:

Q. Well, do you have a recollection of any specific problems that you had over the years? I mean, are there specific things you recall having problems with?

A. Calving intervals. Long calving intervals.

Q. When you say long calving intervals, what in your opinion was an unreasonably long or unnecessarily long calving interval?

MR. BIRD: I'm going to object to that as argumentative. If you know what he means by unreasonably long or unnecessarily long, you can answer.

THE WITNESS: No. I wouldn't know what [p. 464] he means.

BY MR. SHEPARD:

Q. Well, I asked you what the problem was and you said one of the problems was you had long calving intervals. What did you consider to be a long calving interval?

A. Well, relating to the county and state averages, mine were way higher than that.

Q. What were the county and state averages?

A. It will show in the back of our DHIA summary books that we get every year what the state average is and what the county average is.

Q. And do you recall that at some point from between 1975 and 1991 your calving intervals were longer than the state or county averages?

A. Yes.

Q. Can you be any more specific about when your calving intervals exceeded the state and county averages?

MR. BIRD: Without looking at the records, right?

BY MR. SHEPARD:

Q. Yes.

A. I'd be guessing.

Q. And where would I go to see what your calving [p. 465] intervals were? Your DHIA records?

A. Oh, yes.

Q. So if we wanted to compare, if we wanted to find out when you were having problems with your calving intervals, where would I look to find that out?

A. I imagine the state has its own -- at the end of every year we have our DHIA meeting, annual meeting for the county, and they always send out a little booklet. And in the back page it always says the state average, county average and then your average.

MR. BIRD: Your meaning not year, but your.

THE WITNESS: Yeah. In other words, it says your on the top.

MR. BIRD: Y-o-u-r.

THE WITNESS: For years they left that blank, empty, so that you can fill it in yourself, because the DHIA will just about tell you what it is. But the last two or three years now they've been sending out a separate piece of paper with my name on it.

So in other words, nobody else can see what my average is. So it's sort of a personal thing. But they give us that piece of paper that

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Q. [p. 468] When you say very poor conception rate, what do you mean by that?

A. Well, percentage of conception rate.

Q. And is that something that is reported on your DHIA records also?

A. Yes, it is.

Q. And was there a percentage that you strove for or that you thought you should be obtaining?

A. Much higher than what I have been getting, yes.

Q. What, in your mind, is an acceptable percentage of conception?

MR. BIRD: At what point in time?

MR. SHEPARD: Well, let's talk about today first.

MR. BIRD: First service, second service, third service?

BY MR. SHEPARD:

Q. He can tell me.

A. I believe 75 percent conception rate would be a fair figure.

Q. And is that what you felt you should have been obtaining over the years since you put the Harvestore on?

A. That is very close to what I was achieving before I built the Harvestore.

Q. [p. 469] And how do you know that?

A. Well, when I went to AI school the first year, that was in the 70 to 80 percent conception rate.

Q. When did you go to AI schools?



A. In 1967.

Q. Was that just that one year?

A. Yes.

Q. And how do you recall what your conception rate was then?

A. Well, I mean, we -- I guess the books would probably show for it, but whenever one repeats we usually go back and mark an X at the previous service that she was. And I know a few years after I had gotten into AI we had talked to these guys that came around selling semen and this and that and other people, and I know that I was in that range of 75 to 80 percent.

Q. And that was back around 1967 or '68?

A. Yes. Or a few years later, yeah.

Q. Was there a time when you noticed that your conception rate began to decrease?

A. Over the years. It's been a long time, you know, but it doesn't, just like a light switch it doesn't hit you overnight. You slowly go into this thing and you don't know at what point, and all of a

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[p. 471] I wanted to go back to 1970. If, you had these AI schools in 1967, I think we ought to at least go back that far if you still have those.

A. Okay. I will check.

Q. Can you bring those with you if you've got them?

A. Yes.

Q. Are there any other problems other than the long calving intervals and the poor conception rates that you recall that relate to your breeding program?

A. Uterus infections.

Q. Tell me what kind of problems you had.

A. Well, it starts with not, we call it clinging, but hanging on to their placenta. And then eventually you have uterus infections and those things seem to really tie into breeding problems.

Q. And when you had these uterus infections, was there a corresponding increase in problems getting those animals rebred?

A. Oh, yes.

Q. Had you ever had a problem with uterus infections before 1975 when you began using the Harvestore?

A. I believe that there was some problems, yes.

Q. Did the problems become more frequent after 1975?

A. I would say yes. What I know now, yes.

Q. [p. 472] When did they begin to get worse?

MR. BIRD: If you can recall.

THE WITNESS: I could not pinpoint the year. It's been a long time.

BY MR. SHEPARD:

Q. Well, was it ten years ago?

A. Yes. I would say somewhere in there, yes.

Q. When you began to have these problems with uterus infections what did you do to address it?

A. Well, years ago the vets used to do the infusion, but now they drop us a bottle off and we basically infuse our own cows.

Q. Is there anything else other than giving cows an infusion that you have done to try to reduce the number of uterus infections?

A. Well, the last few years they're using Lutalyse. It's some type of a hormone thing that makes them contract their uterus together.

MR. BIRD: L-u-t-a-l-y-s-e. I think. Isn't that right? Blake ought to know.

BY MR. SHEPARD:

Q. Other than using those hormones and the infusions, is there anything else you've done in the way of management changes to try to reduce the number of uterus infections?

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[p. 475] but we never considered it a problem at that time.

Q. Had you ever had a problem like that before 1975?

A. I cannot remember.

Q. When you say before 1991 you had one or two cases a year before then, did you have incidents like that ever since you began using the Harvestore?

A. Well, sometimes you don't know where to tie it to; is it an abortion or some cows maybe just can't carry their calves a full term. I guess over the years we maybe had one or two every year that come in around eight and a half months or something, and you make nothing of it because you thought, well, maybe Mother Nature don't want her to go all the way. So I'm sure over the years we've had some cases of this, yes.

Q. Okay. I understand that. I'm just trying to get a sense of when you recall first observing that this was happening. And as I understand it, are you saying that it began to happen sometime right after you began using the Harvestore?

A. I can't say definitely. Abortion is something that, I guess it's a signal from Mother Nature that things ain't going right probably. And so I don't know, we've probably had some before we had the Harvestore. I'm certain most farmers had some [p. 476] abortions, a few.

Q. Okay. Well, whether you were observing abortions or early calving, whatever the problem was, had you



observed this problem from the time you started using the Harvestore?

A. I guess over the years I never made it a big issue, because I didn't know what was causing this cow to do this. And we don't have a whole string of them; we have one maybe every six months and you thought maybe she slipped and fell or something and lost her calf that way. So I guess when it started, I could not tell you when it started.

Q. Well, have you learned something recently that indicates to you that these problems over the years were caused by the Harvestore?

A. The experience we had in 1991.

Q. How many incidents did you have in 1991 of a cow calving early?

A. I could not tell you the exact number, but when the milk cows were taken off of haylage, the heifers, the young stock and the dry cows still stayed on it for probably, I'd say all of two and a half months probably, into about midsummer. And the dry cows with the heifers, that bunch that was out there, almost, a lot of them came in two weeks early. [p. 477] Some of them were only dry a week. Some of them maybe came in a month and a half too early. We just didn't know what was going on. But now when we look back we know what happened.

Q. I guess what I'm trying to find out is, when you say now that we look back, what do you know now that leads you to believe that these problems were somehow related to the Harvestore?

A. Well, the heifer reproduction did the same thing. There was a period of maybe six months that it was really poor conception rate on the heifers, during that period when the heifers were cleaning out the silo, but the cows were not. We mixed it with corn silage. I didn't think it was the worst feed, but it was what I had, I guess, at the time and so that's what they got. But then we did haul a lot of it. At the end we just quit feeding it.

Q. You're still talking about 1991?

A. '91, yes.

Q. If we were to work backwards from 1991, had this problem of an occasional early birth or an abortion, had that problem gone on for -- I mean, are we talking five years or ten years or fifteen years?

A. I couldn't pinpoint the year down. It's been a [p. 478] long time. But not as severe as it was in 1991.

Q. Well, was the problem in those preceding years any worse than it had been before you started using the Harvestore?

A. Well, we doubled the herd of size of cows, so I'd expect the problem would double then automatically, I guess, because you've got twice as many cows. I never gave it a thought as to how it was relating before. I could not say if we had more for the number of animals.

Q. So you can't tell me one way or another whether the problem was any better or worse after 1975 than before. Is that fair?



A. I can't remember how many I had before, so its hard to pinpoint as to how many we had later on.

Q. Okay. Are there any other problems relating to breeding or reproduction that you can recall?

A. I'm sure there was some abortions, maybe prenature abortions. In other words, they conceived -- some of these cows would come in heat, and maybe about 40 days later or 60 days later, there they were back in heat begin. And it was just hard to believe we were missing these cows. And so if they were conceived and lost, I have no way of knowing.

Q. When did you begin to have a problem with that?

A. [p. 479] It's been a long time. I guess looking back, maybe at the start of the Harvestore system, yes.

Q. Sometime after 1975?

A. Yes, I would say so.

Q. And what you're describing is a situation where cows that you thought you had inseminated were going into heat the next 21 days later?

A. Well, if they went into heat 21 days later, then I believe they just never took. But, I mean, some of hem that would skip periods and then all of a sudden cone in, start all over again, it just seemed like I couldn't explain why they were coming back into heat again at a later date.

Q. Was that a problem that you had ever had before 1975?

A. I don't think it was as noticeable as what we had later on.

Q. What did you do about that problem?

A. What time period are you talking about?

Q. Well, whenever you first noticed this, back in 1975 or when you first began to notice the problem.

A. Well, we really didn't -- you bred them again and, and we had vets come out, do pregnancy, or examine them to see if everything was normal and to explain why they were coming back. I guess this was done [p. 480] when he was doing his pregnancy checking, and he would, some of them had cysts and they were treated and then we went back to breeding them again.

Q. What did your veterinarians tell you, if anything, was the cause of this problem?

A. They never explained as to what was causing it.

Q. Did anyone ever indicate to you that it was related to the quality of the feed that your dairy cows were being fed?

A. No.

Q. Did anyone ever indicate it was related to the Harvestore?

A. No.

Q. Are there any other problems related to breeding or reproduction other than the ones you've just mentioned?

A. No. That would be pretty much all of them.

Q. Do you have a target that you try to achieve with respect to calving intervals?

A. You try and narrow it down. The studies that I've read show that you're more efficient the lower the calving interval you can get.

Q. Do you have a specific target in mind, so many months that you'd like to achieve?

A. Well, I like to achieve down into the 12th month, I

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[p. 500] for itself?

A. It's hard to sit down and say that the silo paid for itself when you take into consideration at the end of the year you've got a hog operation, a grain operation and all these other things. And it's the bottom line is what you go by.

And if it didn't pay for itself, I certainly didn't think it was the Harvestore that was not giving me the return. It could have been because of maybe a bad year of feed or maybe the hog prices were low. I guess at the end of the year every thing was thrown into one kitty, the income from the hogs and that, and I never, ever believed that my Harvestore did not pay for itself.

Q. So is it fair to say that the representation about the silo paying for itself was true?

MR. BIRD: I object to that as improper -- that's not what he said.

BY MR. SHEPARD:

Q. I'm just asking him.

A. I couldn't say yes or no. Like I say, I never sat down and looked to see if -- I guess, like I say, you got to take into all the other considerations. I guess I always felt my Harvestore had paid for

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[p. 502] had you realized the higher profits and more money that Mr. Deutsch had led you to expect?

A. Well, like I said, when you take into consideration the hogs and everything else, it's hard to pinpoint who was making me -- if I had a good year, where it come from. I believe with the, I believe my Harvestore was making me some more money.

Q. Well, would I be correct in saying then that you are not contending that Mr. Deutsch's comments to you about higher profits and more money were false?

MR. BIRD: Well, I'm going to object to that. If you're asking him for legal contentions, that calls for a legal conclusion.

BY MR. SHEPARD:

Q. I'm trying to get a sense from you whether you think those comments that Mr. Deutsch made to you were false.

MR. BIRD: Are you saying now or believed then? That's the point. You're changing tenses now. You were in past tense before, Blake, and now you're coming up present as I understand your question.

BY MR. SHEPARD:

Q. Well, okay. Are you contending now that those [p. 503] remarks about higher profits and more money were false?

A. What I know now? Yes, I would say they were false.

Q. Okay. Well, tell me when you first began to -- tell me what years you failed to receive the higher profits and the additional money that Mr. Deutsch had told you you'd get.

A. That's impossible to answer that, because you've got to have all your records in front of you, and you're talking of all these other enterprises that break down into the final figure at the end of the year. And if the hog markets were low, the drought, bad year or something in the crops -- I never felt that my Harvestore wasn't making enough money.

Q. Okay. I understand that you're saying you didn't realize that at the time. What I'm trying to get a sense of is this: Was there a year, say in 1976, did you realize more profits and more money in 1976 than you had in 1975?

A. I'd have to look at my tax records to show if I realized that there was more profit at the end of the year or not.

Q. And would the same be true for 1977?

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[p. 506] amount of labor that you would have if you had to bale hay. Do you recall that?

A. Yes.

Q. Is that essentially what he told you that you would save labor on, compared to baling hay?

A. Yes.

Q. After using the silo you were able to expand the farm, is that correct? 1977.

A. Yes.

Q. And as I understand it, with the exception of that short period in '77 or '78, you've basically had the same amount of labor that you had before 1975. Is that accurate?

A. Yes.

Q. Well, would it be fair to say that the Harvestore silo has been labor saving compared to baling hay?

MR. BIRD: Again, Counsel, are you talking about his perception now as opposed to what he thought at the



time? I think it's important, Blake. And that's the reason I'd like you to make the distinction in the question.

BY MR. SHEPARD:

Q. Okay. You tell me now, do you think that Mr. Deutsch's comments about the labor-saving advantages of the Harvestore are false?

A. [p. 507] What I know now? Yes, I believe they were false.

Q. And why do you say that?

A. Well, if you look back at all the receipts and everything, all the servicemen that I had to have come out to repair that thing and I paid for that labor. And it takes a lot of help to chop hay compared to baling hay. I mean, I think, yes, I'd say the labor saving has not been -- was false.

Q. And when did you first realize that?

A. This past year.

Q. What did you learn in the last year that led you to that belief?

A. When you lay out all your records and repair bills over the years in front of you and you see all the money that you spent repairing that thing --

Q. Well, I'm not talking about the cost of maintenance; I'm just talking about the amount of time, the labor-saving

efficiency. Do you feel that using the Harvestore was more labor than baling hay?

A. No. It was less labor than baling hay.

Q. So at least that portion of Mr. Deutsch's comment about labor savings was true. Is that fair?

A. Well, when you say labor saving, are you talking man-hours or are you talking costly man-hours?

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[p. 511] that there would be really no records at all that would tell us how much you were feeding?

A. Well, they would not have records. I would imagine in my pile of receipts you could probably come up with some ball park figure, I suppose.

Q. And do you still have your feed receipts that go back to the period before 1975?

A. I believe I handed every feed receipt I ever had in. It's been handed in, I believe.

Q. In to Mr. Bird's office?

A. Yes, I believe so.

Q. But those records would not tell us how much of the protein you bought was being fed to your dairy cows as opposed to your heifers as opposed to your dry cows, is that right?

A. Right.

Q. Now, when I asked you about Mr. Deutsch's representations that the silo would pay for itself in four to five years and that you could achieve higher profits and more money from the use of the Harvestore silo, am I correct that you now believe those statements are false, based on your review of your own records?

A. Yes.

Q. And am I correct that you sat down and looked [p. 512] through some records in the last year or so that led you to believe that those statements were false?

A. Yes.

Q. Okay, what records did you look at in the last year or so that led you to that conclusion?

A. I guess my production records.

Q. Do your production records have information in them that would tell you how much profit and how much money you were making?

A. They don't tell me how much profit I was making, but it tells me that I was not going anywhere over the years.

Q. When you refer to your production records, are you talking about the DHIA records?

A. Yes.

Q. And those records we know were available to you at least as far back as september of 1976, is that right?

MR. BIRD: What do you mean by available to you? You mean for him to review in the last year or so?

MR. SHEPARD: No.

BY MR. SHEPARD:

Q. Do you understand my question?

A. [p. 513] Can you repeat the question again?

Q. You had DHIA records, you were receiving monthly DHIA records all the way back to the time you first began using the Harvestore, is that right?

A. Yes.

Q. So at any given time you could have sat down and looked at the DHIA records to determine what your production was doing.

A. I guess over the time I did sit down and look at my records.

Q. So the records were available to you, even back as far as 1976.

A. Yes.

Q. Now, you mentioned commenting to Mr. Deutsch, I believe in 1990, for the first time you mentioned to him that you were feeding more protein than you thought you should

have to and that maybe your production wasn't what you wanted it to be. I'm paraphrasing. But do you recall telling me about a conversation with Mr. Deutsch in 1990 or 1991 where you expressed some concern about the performance of your milk production and protein?

A. I remember having a conversation with Mr. Deutsch.

Q. Other than that conversation with Mr. Deutsch do you recall any other times when you complained to [p. 514] anyone else about the Harvestore silo or the performance of your dairy herd?

MR. BIRD: That's a double question. I think it's a double question. That's unfair.

BY MR. SHEPARD:

Q. Before that conversation with Mr. Deutsch in 1990, did you complain to anyone else about the Harvestore silo?

MR. BIRD: Are you talking about anybody in the universe?

BY MR. SHEPARD:

Q. Yes.

A. No.

Q. Did you complain to anyone else before that conversation about the performance of your dairy herd?

A. I probably never complained to anybody else but myself.

Q. Did you ever write any letters to anyone, either MVBA or anywhere else, to complain about the Harvestore?

A. No.

Q. Have you ever, before your conversation with Mr. Deutsch, had you ever heard any other Harvestore owners complain about the performance of [p. 515] their Harvestore silo?

A. No.

Q. Before you contacted Mr. Bird had you ever talked to any other lawyers or been contacted by any other lawyers about any possible legal claims involving your Harvestore silo?

A. No.

Q. Did you ever receive any sort of written materials or mailings from an attorney named Ron Schneider?

A. No.

Q. Did you ever speak to Mr. Schneider at all?

A. No.

Q. This is another question that I may have already asked you, and if I did, I apologize. Was there ever a time when you used a free-stall system in your barn, where you didn't have the cows in stanchions?

A. No.



Q. It's been a stanchion barn ever since, as long as you've been on the farm?

A. Yes.

Q. Have there been any changes made to the barn since 1977 other than the -- we've talked a little bit about the change from the milk parlor to a pipeline system. Have there been any other changes

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A. [p. 517] We were in one program, I believe they called it the dairy diversion.

Q. What was the dairy diversion program?

A. The government would pay you -- I don't know how exactly you word it no more, because I know we reduced our production probably by 25 percent. And if we could do that, somehow they calculated they would pay us something. But I don't remember how that all worked out no more.

Q. But basically the government would pay you something for lowering your production by 25 percent?

A. Yeah. It was something like that, yes.

Q. When did you participate in that program?

A. The records would show. I could not remember what year that was.

Q. Was this some sort of program that was intended to keep milk prices up?

A. Well, I guess that and to get the volume of milk off the market, lower the volume.

Q. Who ran the program or administered it? Was that through a county office or a state office?

A. County ASC office.

Q. Was there a local ASC office in Shakopee that you--

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[p. 529] him.

Q. You've talked a little bit already about Dr. Bill Olson's visits to your farm. What was the reason that you contact and Dr. Olson for the first time?

MR. BIRD: You've already covered that, Counsel. That's repetitious.

MR. SCHMITT: No, that's not.

MR. SHEPARD: I think I asked Mary about it. I don't believe I've asked Mr. Klehr about it.

MR. BIRD: Well, go ahead and answer it. I mean, I'm not telling him not to answer it, but my recollection is --

MR. SCHMITT: For him, it's new.

THE WITNESS: Well, the first days after we seen the article in the paper about the Kronebuschs I had a lot of questions I wanted to ask somebody. And I guess over the years the problems I had, I got to the point I didn't trust my feed salesman or my veterinarians, because they didn't seem to solve my problems I was having in the barn.

So I wanted to call somebody that was out of -- I wanted to talk to Mr. Appleman. He was from the University of Minnesota. So I called the [p. 530] university that one morning. This is probably about five days maybe afterward. And Mr. Appleman was away on leave of absence, I guess.

And so they gave me, the lady I was talking to said, "Well what is your problem?" And at this point I was only concerned with my somatic cell and I wanted to talk to somebody. So I think she gave me a veterinarian that was in charge of mastitis controls, this and that. And I talked to him that morning for probably ten minutes on the phone, told him what I had, and I just wanted to know if my somatic cell could be, what could be causing my somatic cell and why am I having these problems.

And he could not help me as far as giving me a direct answer. He didn't know really what it could be. He thought it was the environment, something the cows are laying on. He didn't think it could be haylage. But he asked me if I had talked to Mr. Olson.

I says, "No. I don't know -- who is Mr. Olson?" And he said, "Well, he's a veterinarian." And he says, "I'll give you his number," and he gave me his telephone number and I dialed that number and I talked to Bill Olson [p. 531] for the first time.

BY MR. SHEPARD:

Q. So this person that you talked to at the university the first time you called was, it was somebody other than Dr. Olson?

A. Oh, yeah. The first one, yes.

Q. Do you remember who it was that you talked to?

A. I wrote the name down on my pad the day that I was doing the calling there, but I do not remember who it was.

Q. But it was someone at the university who was apparently an expert in somatic cell counts and mastitis?

A. Well, I got that feeling that he was an expert in that area.

(Off-the-record discussion.)

BY MR. SHEPARD:

Q. Mr. Klehr, so I understand, the person that you talked to at the university the first time was someone that at least you understood to be in charge of mastitis or somatic cell count programs or somebody who worked in that area?

A. Well, the secretary, whoever connected me with him, felt that he could probably answer my questions.

Q. And when you -- do you know -- well, strike that. [p. 532] Do you remember whether or not, was it a guy named Dr. Farnsworth? Does that ring a bell with you at all?

A. I have no idea no more what the name was.

Q. When you talked to him what did you -- tell me what you told him.

A. I told him what was going in my herd, that my somatic cell was so high, and that I been tit dipping; and doing all the practices which I felt should reduce this. And I told him about my Surge equipment being replaced. And a couple weeks before we had just pulled blood samples, but we hadn't gotten them back yet. And I guess I just didn't know what was causing my problem. I was concerned about my somatic cell, because I could not find the answer.

Q. Do you remember what your somatic cell count was at that time?

A. It had to be in the nine hundreds, I believe. 900,000.

Q. How long had the somatic cell counts been high before you made the call?

MR. BIRD: No. Now, you have covered this, Blake. At some, you know, it was painful the number of times you've covered this.

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[p. 534] read in the newspaper about this other Harvestore case?

A. No, I don't believe we talked about that as much as I said, "Could haylage be doing this?"

Q. And what did he say?

A. He didn't think so. He didn't think so. He said that mastitis usually comes from cows laying in dirt or milking equipment or -- but he wasn't certain. He did not pinpoint it down; he just didn't think it could be the haylage.

Q. And was it at that point that he told you, he gave you Dr. Olson's telephone number?

A. Yes.

Q. Now, at this point in time, was this before you had contacted an attorney?

A. Yes.

Q. And so I can pinpoint it in time, it was sometime shortly after you had read the article in the Minneapolis paper about this other Harvestore lawsuit.

A. Yes.

Q. When you talked to Dr. Olson --first of all, when you heard his name, had you ever met Dr. Olson before?

A. No.

Q. [p. 535] Had you ever heard his name before?

A. No.

Q. Did you know anything at all about him?

A. No.



Q. And I believe I'll have to go back to my notes so I don't offend your attorney and I don't want to repeat any of this, but I believe you indicated he came out, Dr. Olson came out to your farm for the first time sometime around March 19th, if I'm not mistaken, is that correct?

A. That would be very close, yes.

Q. Okay. Before Dr. Olson came out, when you talked to him on the phone for the first time, what did you tell him?

A. We got into the somatic cell, and then I think the conversation led into reproduction problems and my milk production. All of those things.

Q. And what was it you told him about your reproduction and your production?

A. My conception rate was very poor and I was very dissatisfied with it.

Q. And was that something you had seen on the DHIA records?

A. Yes.

Q. Do you recall how long that had been going on?

A. [p. 536] It had been going on for a long time, but I never thought it was the silo that caused it.

Q. When you say a long time can you give me just a ball park of how long it had been going on?

A. Maybe ten years.

Q. And how long had -- strike that. What did you tell him about your milk production?

A. Well, that I thought my milk production should be a lot higher for as hard as I was working with the cows. I expected a lot more production out of my cows.

Q. Do you remember what it was, what your production was at that time?

A. In the 16,000 range.

Q. What did you feel your production should have been at that time?

MR. BIRD: What did he feel at that time his production should have been at that time.

BY MR. SHEPARD:

Q. Yes.

A. Well, I felt I was above average dairyman and I felt that I should have gotten above average production. I should be there, yes.

Q. When you say above average, did you have a figure in mind where you thought you should have been?

A. [p. 537] No, I could not say a figure.

Q. What did Dr. Olson say to you on the phone after you told him this?

A. Well, I explained all the things to him and he said he would be coming out in about a week's time for a farm visit and look at the feed.

Q. And I believe we've talked about those visits already.

A. Yes.

Q. When Dr. Olson came out, I understand he took some feed samples, is that correct?

A. Yes.

Q. Do you recall how many feed samples he took?

A. I believe he took one of everything, the high-moisture corn, the haylage and the corn silage, baled hay.

Q. Do you recall what the results of any of those other feed tests were from the samples he took?

A. Well, I'm certain he showed me, but I could not recall what they showed, what they were no more.

Q. What do you recall him telling you about the results of the feed tests he took from the Harvestore haylage unit?

A. It confirmed what we'd been getting all these years, that we had this heat damage. There is a [p. 538] low percentage of heat damage on it.

MR. SHEPARD: Can you read that answer back?

(Answer read.)

BY MR. SHEPARD:

Q. What did Dr. Olson tell you about heat damage?

MR. BIRD: That assumes that he told him anything about heat damage.

THE WITNESS: I couldn't recall if he did tell me.

BY MR. SHEPARD:

Q. Well, you had been having your feed tested on a regular basis up until that time, hadn't you?

A. Well, I wouldn't say on a regular basis, but maybe twice a year we had it done.

Q. So until then -- was it Mark, is it Koepp?

A. Yes.

Q. Was he the person who was testing your feed?

A. Well, there was other feed salesmen or feed store dealers that did it when I was buying their feed. Before, before Mark Koepp, yes.

Q. Over the last six years Mark Koepp had been the one who had made the decision when to test your feed?

A. Well, I don't know if he made the -- we usually tested it in the summer and then in the fall when [p. 539] the corn silage, when all the new crops, or all the crops were in, then we'd test it again.

Q. Had Mark Koepp ever indicated to you that there was, that you had heat damage in the feed?

A. It was brought up that there was some heat damage to it, yes.

Q. Who brought that up?

A. Mark Koepp. He would explain the whole, he'd go over the whole printout that we got back on it.

Q. What did Mark Koepp tell you about heat damage in the feed?

A. He didn't say anything. He just -- to me, I had the feeling that he wasn't concerned about that thing. He was out to sell me more feed.

Q. Well, when you say he told you about heat damage, what was it that he said?

MR. BIRD: I don't think he said he told him about heat damage. He said there was heat damage.

THE WITNESS: Yeah.

BY MR. SHEPARD:

Q. Well, were you able to tell that from looking at the test yourself or would Mr. Koepp explain to you what the results of the test showed?

A. No. The figure would be right there. It said heat [p. 540] damage and a certain percent.

Q. And how long -- well, strike that. Had you had conversations about heat damage with Mr. Koepp during the entire time he was working for you?

MR. BIRD: I'm going to object to that. I don't think you've established that he had conversations with him about heat damage.

THE WITNESS I don't understand the question.

BY MR. SHEPARD:

Q. All right. Let me see if I can get a couple things straight. I'm sorry if I'm not getting this straight. Did you and Mr. Koepp ever have any discussions about heat damage?

A. We talked about it, but it was not a subject that we stayed on because --

Q. Okay. Well, when you talked about it, what did you talk about?

A. It was something that was -- he reported that there was heat damage, but went on to the next thing, because -- he just reported what the analysis would come, back, and as far as where the heat damage come from or if it was unusual or anything, he never mentioned. So I just took for granted that that's standard and that's the standard thing. I wasn't [p. 541] concerned about the three percent heat damage, because I didn't know how severe that was causing me.

Q. Well, when he discussed heat damage with you what was your understanding of what heat damage was?



A. Fermentation.

Q. What was your understanding of how it was caused?

A. I had no idea. I just thought that was a standard fermentation.

Q. Well, when he said heat damage, did that concern you at all?

A. It didn't seem to concern him, so I guess I don't believe I was concerned about it neither.

Q. Do you remember whether or not any of the other feed salesmen that you worked with before Mr. Koepp had ever mentioned heat damage with you?

A. No. I'd say not as much as what -- no. I can't remember every conversation with those other guys and heat damage brought up, no.

Q. Do you ever remember seeing any feed tests before you began working with Mr. Koepp that indicated that there was heat damage in the feed?

A. I cannot recall any reports, no.

Q. And am I right that when Dr. Olson came back and told you about the results of the feed tests that [p. 542] he took that they confirmed the results that you had been getting from Mr. Koepp that showed heat damage?

A. Well, it confirmed that there was heat damage, but Mr. Olson got into it a little bit deeper, because all these

years three percent heat damage to me was, that's not much, you know. I just thought that was a natural thing.

But when he started talking about three percent, I don't know how he did it, on a dry matter or was it on a protein thing. I'm not an expert at all on this. But then he threw some bigger figures in, like 30 percent of your feed is damaged here. And, wow, I thought. Really?

Q. Well, was Mr. Koepp present when Dr. Olson told you all these things about --

A. No.

Q. Did Dr. Olson ever meet with Mr. Koepp?

A. No.

Q. Is Mr. Koepp still working with you?

A. Yes.

Q. Have you told him what Dr. Olson reported to you about the heat damage in the feed?

A. I believe the issue has been talked about as far as the analysis coming back. I do not believe I told

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[p. 591] Harvestore farmers around your geographic area?

A. At what time are you talking about?

Q. At any time.

A. Within the last few months I had heard of some other farmer that had filed a lawsuit.

Q. How about before you filed your lawsuit --

A. No.

Q. -- had you heard of any lawsuits brought by farmers in your area against Harvestore?

A. No.

Q. Before you read about the Kronebusch case in the newspaper had you heard of any other lawsuits against Harvestore other than Mr. Dubbie's lawsuit?

A. No other case.

Q. You were here last week when your wife was deposed. And do you recall her testifying about some financial problems that you and your wife had in the early 1980s?

A. Yes.

Q. Do you recall yourself that there were some financial problems around that time period?

A. Yes.

Q. Can you tell me what the nature of the problems were that you were experiencing around that time?

A. [p. 592] Milk checks weren't big enough.

Q. At that time were you having problems making your loan payments?

A. I believe there was some years that we had some problems making.

Q. Do you recall what loans you had at that time that you were having some problems with?

A. We had one year, with Prudential, the real estate loan.

MR. BIRD: Well, that's it. You've answered his question.

BY MR. SHEPARD:

Q. Well, is that the only problem you recall or were there other loans where you were having problems making the payments?

MR. BIRD: At what time? In the early '80s?

BY MR. SHEPARD:

Q. In the early 1980s.

MR. BIRD: If you can recall.

THE WITNESS: I cannot recall.

BY MR. SHEPARD:

Q. Is it your -- well, strike that. Was it your belief at that time that the problems you were having with the loan was because your milk checks

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[p. 603] when you did that?

A. Yes.

Q. One in, I think it was 1987 or 1988?

A. I believe it was '88.

Q. And then a second time in 1990?

A. Yes.

Q. Other than those changes, do you recall any other management changes that you made?

A. No.

Q. Do you have any records that would show exactly when it was that you went to the milking parlor as opposed to milking in the stanchions?

A. No. There was no records kept on that.

MR. BIRD: Are you going to move to a new area, Blake?

MR. SHEPARD: Yeah.

MR. BIRD: Why don't we take a break.

(Brief recess.)

BY MR. SHEPARD:

Q. Mr. Klehr, let me go back and ask one more question about the period from December of '87 through December of 1990. During this time did you consult with anyone about your decline in milk production during that time period?

A. No.

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[p. 606] THE WITNESS: Well, I guess it's page two, yeah.

MR. BIRD: Well, it says right down here.

THE WITNESS: Oh, yeah. Page two. Basically the whole thing, how they engineered that first Harvestore.

BY MR. SHEPARD:

Q. And why was that important to you?

A. Well, that many years ago, I believed that a lot of study and a lot of engineering costs went into it, and coming from A.O. Smith Corporation I believed that it was well-engineered.

Q. Is there anything else in Exhibit 15 that you recall reading that was important to your decision to buy the Harvestore?



A. Then you get to page five. The breather bag system.

Q. Why was that important to you?

A. Because I definitely wanted to, with the experience I had over the years of air coming in contact with my feed, I wanted something that would keep the air away from the feed and give me the good quality feed that I wanted for my cows.

Q. Is there anything else in Exhibit 15 that was [p. 607] important to you?

A. Well, they talk about the partnership here, that --

Q. What page are you looking at, for the record?

A. Page eight. My dealer or my service people from MVBA would be my partner in making this thing operate.

Q. And why was that important to you?

A. Well, it's like buying any piece of farm equipment; it's the service after the sale that means a lot.

Q. Is there in anything else in Exhibit 15?

A. No, that would be all.

Q. Showing you what's been marked as Deposition Exhibit 16, and for the record, Exhibit 16 is Research Report on -- I believe it's haylage; it doesn't show up on the document -- A Complete Short Course In Print. Do you recall seeing that document before?

A. Yes.

Q. When do you remember first seeing that document?

A. This was after I had purchased my silo.

Q. Do you recall when it was that you first saw that?

A. It was the earlier years. I couldn't say what year for certain.

Q. Do you remember how you got that document?

A. I believe it was sent to me.

Q. [p. 608] Sent to you in the mail?

A. Yes.

Q. Do you recall who sent it to you?

A. I believe A.O. Smith sent it to me.

Q. And why do you say that?

A. Being that A.O. Smith was the company that was making the silos, that they were sending me the information that I was getting.

Q. Do you have a specific recollection of A.O. Smith having mailed that to you?

A. I would definitely believe that that's where it come from, yes.

MR. SHEPARD: I guess I want to object to the answer as being nonresponsive.

BY MR. SHEPARD:

Q. Let me ask the question again. Do you have a specific recollection of receiving that in the mail from A.O. Smith?

MR. BIRD: Objection. That's been asked and answered.

MR. SHEPARD: It's been asked, but it wasn't answered.

MR. BIRD: Well --

THE WITNESS: A definite recollection?

BY MR. SHEPARD:

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[p. 610] Mr. Klehr has had a chance to review the documents since we started the deposition, with the idea in mind that he would be asked to go through and point out the things that he saw that were important to him.

MR. BIRD: That's correct. Now, when you're using the word important, you're not using it in the sense of relying upon it, because I think you've already asked him about all of the documents. So --

THE WITNESS: On page seven they're talking about putting up haylage, and the advantages of it. It was

sort of like an educational thing. This was something I got after I purchased my silo, but they were educating me as to what chop I should do and the moisture that they wanted it at.

BY MR. SHEPARD:

Q. And why was that information important to you when you read it?

A. Well, it was things that I had already known about putting up feed, but like I say, it was just sort of updating my knowledge, I guess. Keep me on top, make certain that I put up that good feed.

Q. Is there anything else in Exhibit 15 that was [p. 611] important to you when you read it?

A. Well, they got, on page 10, they have what happens to forage inside of an oxygen-limited storage structure; where they say more nutrition, more meat, more milk, more profit per acre from haylage. And "What's the reason? For the answer, let's see what goes on in an oxygen-limited glass-lined structure that produces such results." They're talking about their silo.

And how the fermentation, how fermentation works. On page 11 --

Q. Before you go on to page 11, first of all, let me ask you this: Why was that information important to you?

A. Well, I'm not an engineer and I'm certainly not a chemist, as to how haylage ferments, what makes fermentation and what nutrition, what it all breaks down to.

So like I say, when I read these things it's interesting because it's telling me probably some of the things I did not know about fermentation and how it works and how it converts itself into other things.

Q. Is there anything else in Exhibit 16 that was important to you?

A. Page 11 has got no oxygen, no molds.

Q. [p. 612] And why was that important to you?

A. Well, over the years I had experience with silage put outside on a pile or the top of a silo when you went up there in the spring to start a new silo off. And I knew what molds were and I definitely wanted to stay away from that.

Q. Anything else in Exhibit 16?

A. They did an experiment -- on page 16, they did an experiment with some Holstein cows. And what they're doing is haylage versus baled hay for dairy cows. The cows ate more haylage consumed --

MR. SHERAN: Are you referring to page 16?

THE WITNESS: Yes, 16. Well, 17 there. I'm sure it's 16. No. Page 17. Okay. Page 17. And all these things, all the information they're talking about is assuring me that I still bought the Cadillac of it all. I was happy with my Harvestore. Here they're talking about forage works with dairy cattle from birth on.

BY MR. SHEPARD:

Q. What page are you on now?

A. Nineteen.

Q. And why was that information important to you?

A. Because my young stock was going to get some good [p. 613] feed. Definitely, healthy young stock is going to grow to healthy cows.

Q. Is there anything else in Exhibit 16 that was important to you?

A. Page 23, I'd say the whole page was very interesting. They all talked about the oxygen-limited and how the whole A.O. Smith Corporation started selling Harvestores.

Q. And why was that information important to you?

MR. BIRD: Talking about the A.O. Smith Corporation or the whole page?

BY MR. SHEPARD:

Q. Well, why don't we start with what you just told me about A.O. Smith Corporation.

A. Here it says "A.O. Smith engineer who was responsible for the first Harvestore said, 'If spoilage is a problem, let's build an airtight silo; if handling is a problem, let's use an automated unloader.'"

Q. And why was that important?



A. If the company has been in business for so many years, you just have faith in something like that.

Q. Is there anything else in Exhibit 16 that was important to you?

A. Well, another one is A.O. Smith Corporation was

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A. [p. 616] This story of how the Harvestore started always excites me, because all these little things always seem to grow into big things. Like I say, it was always interesting to read that story how Mr., I can't pronounce it. Heath.

Q. What page are you looking at?

A. Oh, page, says 2-3 there, I don't know. It says 2-3, but it must be page three. No, can't be that neither. Says 2-3.

Q. Okay. And tell me why that was important to you.

A. It just, it's sort of like the start of -- what they're telling you is the start of how the Harvestore became what it was and how it grew into a big company and all the research that they had done with the beer tanks and the glass fused.

Q. Now, did you understand this document, Exhibit 17, to be an owner's manual relating to the silo that your father had bought, the 17 by 40?

A. Yes.

Q. Is there anything else in Exhibit 17 that was important to you when you read it?

A. Well, they talked about the oxygen-free feature created the problem of the expansion and contraction of gas in the silo and how they engineered a breather system that would take care [p. 617] of that problem.

Q. And why was that important to you?

A. Like I say, because of the experience I had with some spoilage now and then, and I was looking for something that would take care of the good feed that I had to put up.

MR. BIRD: What page is that on?

THE WITNESS: It's 2-4. And even on top in the first paragraph they remind you of this oxygen-free storage. "Harvestore developed the first structure that stores crops without the oxidation that causes loss of feed value."

BY MR. SHEPARD:

Q. Anything else in Exhibit 17 that was important to you in your decision to buy the Harvestore?

A. They talk about cutting -- on page, now it's 3-3 they're talking about cutting early, when you just see one alfalfa blossom. And with my experience, the early cutting, save that protein and save some field loss. All those things made sense to me.

Q. Is there anything else in that document that was important to your decision?

A. Then on page 3-9, Here's How to Maintain Oxygen-Free Storage. They tell you the things to do to put up top quality haylage. They showed the [p. 618] Harvestore and the fruit jar, which I always related them as that's how the system works. And they told me make sure you keep the door latch closed.

Q. And why was the comparison to the fruit jar important to you?

A. Because over the years I've seen my mom, and Mary did a lot of canning in her earlier years, but my mom and them, they canned and that was to preserve whatever was in that fruit jar. Kept the air from getting in contact.

Q. When you bought the Harvestore, is that how you understood the Harvestore to work?

A. In a way, because I know the fruit jar doesn't have the breather bags, but I knew that Harvestore had done the engineering to make that breather system work. So basically yes, I would say that the fruit jar was an example of how it worked. And with their engineering and the breather system, I felt confident that they knew what they were doing.

Q. Anything else in Exhibit 17?

A. A lot of the pages are just repeat of the previous pages. They keep talking about the fruit jar and the Harvestore and oxygen-free storage prevents spoilage. They talk about harvesting high-moisture

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[p. 627] was interested in the different sizes that they sold.

Q. Is there anything else about that document that was important to you?

A. Well, they talked about the moon and the sun here, which is important.

Q. What about the moon and the sun?

A. Well, what they're telling you is what the breather bag does when the moon goes up and the sun goes down, and how the breather system works. Air does not come in contact with the feed.

Q. And we've been through similar statements in the advertising. Tell me again why that particular portion was important to you.

A. Well, because of the experience I had with some spoilage in the earlier silos at different times of the year, that I definitely wanted to preserve my feed.

Q. Are you talking about spoilage in the staves and in the pile?

A. Yeah. In the cement stave or on the pile, yes.

Q. Is there anything else about Exhibit 20?

A. No. That would be all.

Q. Showing you what's been marked here as Deposition Exhibit 21, this is a document entitled Seminar In

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Q. [p. 629] When do you remember seeing that document?

A. Sometime before we bought the silo.

Q. Do you remember how you got that document?

A. Boy, it could be any variety of any ways. Probably picked it up at a fair.

Q. Would it be fair to say you don't have any recollection of where you got that?

A. No. No.

Q. What do you recall reading in that document that was important to your decision to buy the Harvestore?

A. Because of the years with spoilage and they're talking here as to what causes spoilage, and I just knew that if I bought the Harvestore silo I would definitely be buying the better of any silo, because this here was not going to let my feed spoil. It was going to keep the air away from contact with my feed.

Q. This document, at least from the print, looks like an older document. Do you have any recollection of how long before you purchased the silo you first saw that?

MR. BIRD: I'm going to object to your characterization of the print. Assumes facts not in evidence. Those are conclusions you're drawing [p. 630] from that

and apparently making part of your question. Go ahead and answer.

THE WITNESS: No, I could not tell you as to what year I read this.

BY MR. SHEPARD:

Q. Showing you what's been marked here as Deposition Exhibit 23, this is a document entitled, A Harvestore Owner Can Make A Profit While His Neighbors Are Losing Their Shirts. Do you recall seeing that document before?

MR. BIRD: It's Exhibit twenty --

MR. SHEPARD: Three.

THE WITNESS: Yes.

BY MR. SHEPARD:

Q. Do you remember when you saw that?

A. We saw this before we bought the silo.

Q. Do you recall how you got that document?

A. Could be one of many ways.

Q. You don't have any recollection?

A. No, I do not. No.

Q. What did you read in that document that was important to your decision to buy the silo in 1974?



A. It was just a very profitable thing to buy a Harvestore, because if you didn't buy a Harvestore

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[p. 632] feed, and how aerobic bacteria, those which thrive in the presence of air, are free to multiply and cause fermentation. And what this was doing is it was assuring me that I still had bought the best silo.

Q. Is there anything else in that document that was important to you?

MR. BIRD: Take your time now.

THE WITNESS: On the front page there is a paragraph there. "There is no better way known to store and preserve crop nutrition for livestock than through the Harvestore oxygen-limiting process. As we discussed in the last installment of Harvestore Basics, the combination of Harvestore's nearly airtight construction with the efficient breather bag system protects feed from oxygen and spoilage which results from oxidation."

It was just reassuring me that I still had bought the best silo.

BY MR. SHEPARD:

Q. All right. Is that it for --

A. Yes.

Q. -- Exhibit 24?

A. Yup.

Q. Showing you what's marked here as Deposition [p. 633] Exhibit 25, this is a document entitled Do You Have A Nose For Good Feed. Do you recall seeing that document before?

A. Yes.

Q. Do you recall when you saw it?

A. I saw this before we purchased our silo.

Q. Do you recall how you got that document?

A. I'd have to say probably picked it up at a fair someplace.

Q. Do you have a specific recollection?

A. No, I don't.

Q. What did you read in that document that was important to your decision to buy the silo in 1974, if anything?

MR. BIRD: Read or see?

THE WITNESS: Well, it was a scratch and sniff thing, and it kind of told me as to what good haylage should smell like.

BY MR. SHEPARD:

Q. Was there anything -- so you're talking about the scratch and sniff portion?

A. Yeah.

Q. Do you recall scratching and sniffing that when you got it?

A. Yes.

Q. [p. 634] And what did it smell like?

A. Well, it smelled like molasses. It had this molasses smell.

Q. Why was that important to your decision to purchase the silo?

A. Well, that the cows would love that smell and they would really attract or eat a lot more of the feed.

Q. Well, now you're talking about what the written part of the document says?

A. No, no. They aren't saying it. But the smell, the molasses smell and the good smelling feed would definitely make feed consumption, entice them to eat more. No, they aren't saying that.

MR. BIRD: What exhibit is that?

THE WITNESS: 25

BY MR. SHEPARD:

Q. So that was what you thought when you smelled the little scratch and sniff box on the ad?

A. Yes.

Q. Is there anything else about that document that was important to your decision to buy the silo?

A. Well, the scratch and sniff, the smelling of the molasses all goes back to this oxygen-limited breather bag. Top filling, bottom unload,

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[p. 639] cost and the advantages of feeding high-moisture feed, high-moisture grain, which is more palatable and the cows would enjoy eating it.

BY MR. SHEPARD:

Q. Were those statements about the high-moisture corn consistent with what your experience had been using the 17 by 40?

A. Yes.

Q. And was the discussion about how to put up good feed consistent with the methods you had been using in putting your feed up?

A. Yes.

Q. And had you found that by following the practices that are described in that document that you were able to put up good feed?

A. Will you repeat that question?

MR. SHEPARD: You want to read it back, please?

(Question read.)

THE WITNESS: Yes.

BY MR. SHEPARD:

Q. Is there anything else in that document that was important to, you?

A. No.

Q. Showing you what's marked here as Klehr Deposition

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Q. [p. 644] Was there something that you recall reading in that document that was important to you at the time that you read it?

A. It was convincing me at the time that I was making a profit with my Harvestore silo.

Q. What is in that document that caused you to think that?

A. That this farmer is telling me that it's not the cost, it was the profit that he's making. It lowers your feed costs, increased production, reduces supplement bills and less labor made the Harvestore system my best investment.

Q. And that convinced you that you were making profits on your farm as well?

A. I was making profits using the Harvestore system, yes.

Q. Is there anything else about that document that was important to you?

A. No.

Q. The last document here, Deposition Exhibit 31, this is a document entitled The Harvestore System, How It Can Help Make Every Livestock Farm More Efficient And More Profitable.

MR. BIRD: Do you have a question about the document?

[p. 645] BY MR. SHEPARD:

Q. Have you seen that document before?

A. Yes, I've seen it before.

Q. Do you recall when you saw it?

A. I'd say after I purchased my Harvestore.

Q. Is there something you read in that document that was important to you at the time that you read it?

A. I believe everything in this magazine was important.

Q. So the entire thing was important to you?



A. Yes.

Q. Okay. What was it about this particular document that was important to you?

MR. BIRD: You just asked him that question. He said the entire thing was important.

THE WITNESS: Yes, I would say definitely the whole thing.

BY MR. SHEPARD:

Q. Well, I apologize. Why was the information in this document important to you?

A. Because it still assured me that, it told me how the Harvestore system worked and removed any doubt that I had that the Harvestore system was working. It convinced me that I still had made a good purchase

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A. I'd say not.

Q. Okay. Tell me what it is about the Harvestore that is beneficial as compared to baling hay, from your experience.

A. Repeat that question?

Q. Based on your experience, and remember I'm asking you to eliminate for the moment the fact that you're critical of the quality of the feed, but what I want you to do

essentially is tell me why a Harvestore, in terms of labor savings, is better than baling hay.

A. But you're pointing it only to Harvestore.

Q. That's right.

A. And I would say the cement stave silo would give me the same effect.

Q. That's fine. But I'm asking about Harvestore. Why was the Harvestore better than baling hay as far as labor savings is concerned?

A. Well, labor saving in baling hay was hard, sweaty work, and I guess chopping haylage was a much easier, it was more mechanical means of putting it up.

Q. Is it less time-consuming?

A. Yes.

Q. And I think you mentioned that, early on in your [p.651] deposition I think you said that you had many other things to do with your time besides spend it baling, or hauling bales of hay around.

A. That's right.

Q. What's the relative time savings between chopping hay and storing it in a Harvestore as compared to baling hay?

MR. BIRD: If you know that.

BY MR. SHERAN:

Q. Well, you've done both.

A. Yes I've done both. You could probably put up chopped hay twice as fast as baled hay.

Q. How about in terms of having to take on additional hired help? Do you need more hired help to bale hay as compared to using a Harvestore?

A. No. I'd say it's about the same amount of manpower.

Q. About the same amount. So essentially what it does is it reduces the amount of physical labor and it frees up your time so that you can spend that time doing other things around the farm. It has that advantage, correct?

A. It has that advantage.

Q. And you've found that to be true of the Harvestore throughout the entire 17 years now that you've [p. 652] owned it.

A. It did help take the workload off of putting up haylage.

Q. I guess the next point that you raised is that you did not want to pile the hay outside, laying it on the ground. And the obvious advantage of the Harvestore is that you would not have to do that, you'd have a place to store it, correct?

A. Yes.

Q. And that of course would be true of any other silo.

A. Yes.

Q. So at least as far as that element of your consideration as to why you wanted to buy ultimately a Harvestore, you've accomplished that, haven't you?

A. I could have accomplished it with any other structure though, too.

Q. And you did accomplish it with the Harvestore that you bought.

A. Yes, I did. Yes.

Q. The third thing that you mentioned was that you were looking to expand the herd. And that is something that you did in fact do. You doubled the size of your herd, correct?

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[p. 664] the picture, is that correct?

A. Yes.

Q. Other than what's contained in this page here, do you have any recollection of Mr. Deutsch ever saying anything about a fruit jar?

A. Yes.

Q. Now, when we went through the various representations that Mr. Deutsch had made, it was our

intention, and I'm sure Mr. Shepard's intention, to get from you everything that had been said by Mr. Deutsch to you about the operation of the unit and what representations he made about it. You never mentioned that one. Tell me about that particular representation.

A. Mr. Deutsch mentioned the fruit jar in our kitchen.

Q. What did he say?

A. That the system, the Harvestore system works like a fruit jar.

Q. I think you mentioned that because of your familiarity with fruit jars, because of your watching your mother can things or watching your wife can things, that you have some familiarity as to what that meant. Is that correct?

A. Yes.

Q. [p. 665] But even by that time you knew that a Harvestore did not work exactly like a fruit jar, just based upon your own experience with the corn unit. True?

A. But the engineers were still working on the structures, and so I figured if there was a problem that we had in the corn unit that I felt that they had solved that problem when it got to the haylage.

Q. Well, this particular piece of literature was one that you said that you thought related to the corn unit.

A. Yeah.

Q. All right. But you knew from your operation of the corn unit that a Harvestore does not work in exactly the same way as that a fruit jar works, because you knew that air got in through the unloader door every time you unloaded the corn unit.

MR. BIRD: He never testified to that. I'm going to object. That's a mischaracterization of his testimony.

BY MR. SHERAN:

Q. Is that true?

A. Repeat that?

Q. [p. 666] You don't admit air into the bottom of the fruit jar, do you?

A. You don't let air in the bottom of a fruit jar? Is that what you're asking me?

Q. Right.

A. If you had a door on the bottom of the fruit jar --

Q. If you had a door on the bottom of the fruit jar, you'd let air in the bottom of the fruit jar. But you don't have a door in the bottom of a fruit jar, do you?

A. Right.

Q. And you don't open the top of the fruit jar up and fill it with some more preserves or whatever it is that you typically keep in a fruit jar and then close it up and hope to



maintain a sealed unit. You don't do that with a fruit jar, do you?

A. If the fruit jar lid is put on tight, you would be preserving it.

Q. If you take the fruit jar cap off, take something out of it, put something more in, you're allowing air into the fruit jar.

A. Yeah. But Harvestore engineers had solved that problem. They had a breather system that took care of the air coming in contact with the feed.

Q. I'm talking about when you open up the Harvestore

\* \* \*

[p. 668] vague. If you understand it --

THE WITNESS: I don't understand the question.

BY MR. SHERAN:

Q. Even when you looked at this Here's How book and you saw the analogy that's made there between the fruit jar and the Harvestore, or whenever Mr. Deutsch made his remarks about a comparison of a Harvestore to a fruit jar, you knew that there was some very distinct differences between a Harvestore and a fruit jar, did you not? They were not the same thing.

A. The book says they were.

Q. Maybe the books says that, but you know from your own experience that that isn't true, correct?

MR. BIRD: Now or then?

BY MR. SHERAN:

Q. Then.

A. Well, at the time I'd say that's how we compared the Harvestore to a fruit jar. They're airtight. Air did not get in contact with it.

Q. Maybe that's how you compared it, but that's not my question. We'll go back to the beginning here. You knew that your corn unit, the corn unit to which this fruit jar is being compared, had an

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[p. 678] when the structure is full, so the bags can be pulled up and out of the way, allowing the full rated capacity of the structure to be used." That information was also significant to you, correct? I'm particularly referring to that portion of it that relates to the pressure relief valve.

A. I always had the understanding that those little things on top of the roof were attached to the bags. I never knew that there it was something that went into the structure. That's my belief. When they talked about relief valves, to me, that was what they were; they went into the bag.

Q. Well, maybe that's true, but that doesn't address my question. You told Mr. Shepard that this entire document

was something that was important and significant to you when you read it. Would I be correct in assuming that that would include the statement that a pressure relief valve operates only during periods of unusual temperature change? That's something that you reviewed and was significant to you, correct?

A. I didn't know there was different type of valves up there. I thought everything on top of that rod went into the bag. When they talk pressure relief valve, I thought that's the thing that goes, just

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[p. 685] again, that it's argumentative. I think he's answered your question several times.

MR. SHERAN: He has not answered the question.

MR. BIRD: He's answered it several times. You're making the assumption that this is based on some sort of his personal expectation.

MR. SHERAN: You bet I am. That's exactly what I'm basing it on.

MR. BIRD: Well, you're making the further assumption that it's his personal expectation at that time from the Harvestore, and that hasn't been established. I mean, he's already -- go ahead and answer.

BY MR. SHERAN:

Q. My question is very simple. If in 1979 you expected to get \$34,000 more in milk production than you actually

got, that amount of money is significant enough that you would have noticed it, true?

A. What I got at the end of the year, the milk checks I got was mine. That's all I got. If there was some missing, how did I know what I was supposed to have?

Q. Well, if you expected going into the year 1979 that

\* \* \*

[p. 688] milk production than you actually got, that dollar amount is significant enough that it would have raised a red flag, would it not? That's something you would have noticed?

MR. BIRD: I'm going to object to that on the grounds that he's answered that several times to the best of his ability, and I'm instructing him not to answer the question.

BY MR. SHERAN:

Q. In the year 1984 Mr. Behr says that you lost milk production in the amount of \$99,421. Do you see that?

A. Yes.

Q. Have you ever in your years of farming ever had a profit of \$99,000 from that farm?

A. We had a profit before I built the Harvestore; put it that way.

Q. Of \$99,000?

A. I'm not talking about dollars. We were small operators then, but we had a profit.

Q. What I'm getting at is this: That \$99,000 is a significant amount of money compared to what your income and your profit was from the farm. True?

A. At the end of the year I had an enterprise of hogs, milk, crops, and who knows whatever else. It was [p. 689] all thrown into one kitty, and I never once thought that it was because of my Harvestore not giving me the profit or not doing what it was supposed to. Could have been the bad hogs or bad weather, bad crops.

Q. If you came up short one year \$99,000, that amount of money is a significant enough amount of money so that it would have caught your attention, wouldn't it?

A. I farmed long enough that you cannot project ahead a whole year what you think you're going to get, because it never comes out that way. You take what the good Lord gives you.

Q. One of the representations that Mr. Deutsch made to you is that the Harvestore unit would be more convenient. Do you think that that was true?

A. Would be more convenient than what?

Q. Let me tell you where I'm heading with this series of questions. I'm going to go through the list of representations that he made. Some of the things I know you feel are false. I'm curious as to whether there are some of the things that he represented to you that you think are true.

And I'll just go through the list and you can tell me which things you think are true and [p. 690] which are false. One of the representations he made was that it was more convenient. Do you think that's true or false?

A. More convenient than baling hay? I'd say it was true.

Q. Even based upon the information that you have now, you still believe that that representation is true.

A. Yes.

Q. He told you that it was easier putting it up in haylage or chopped hay than baled hay. Was that true?

A. That was true.

Q. One of the advantages of the unit that he emphasized, according to your testimony, was the bottom unloading feature and that indeed has proven to be an advantage over, for instance, a top unloading stave silo. Is that true?

A. Repeat the question?

Q. Having a bottom unloading silo is an advantage over having a top unloading silo, right?

A. You asking what I know now or what I know then?

Q. Well, are you contending now that that is not true?

A. There is an advantage to having a bottom unloader,



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[p. 692] question. You can answer if you understand.

BY MR. SHERAN:

Q. Let me ask it this way, Mr. Klehr: You were aware going into the deal that there were certain service costs associated with a bottom unloader that you might not have, that you certainly wouldn't have with baled hay and you might not have with a top unloading system. Is that fair?

A. I never had an unloader in haylage before I bought this one. And the problems that if we had some, and we did, with the old high-moisture corn, I believe that buying this big Goliath unloader with all of the engineering put into it, coming from the old A.O. Smith Company, I believed that any problems would have been solved. And I would have expected very little maintenance on the unloader.

Q. But you did have some amount of maintenance, and every time you had maintenance somebody sent you a bill for it, right?

A. Yes.

Q. And as I understand your testimony, your criticism of that representation is that you spent a lot of money on repairing it, right?

A. Or getting it loose, if it got wedged down or something, repairing it, yes.

Q. [p. 693] And each time you had a repair they would send you a bill contemporaneous with the repair.

A. Yes.

Q. You didn't get a whole stack of bills in 1990, you got those bills over the years.

A. Yes.

Q. So over the years, had you elected to do so, you could have kept abreast as to what the total amount of bills were.

A. I had an idea what the bills were.

Q. You did.

A. Oh, yes.

Q. Okay. As they were going along?

A. Yes.

Q. One of the representations that was made was that you could fill and unload at the same time. That's true, is it not?

A. Yes.

Q. Is there anything about that representation that was false, in your opinion?

A. No.

Q. You mentioned that Mr. Deutsch never had anything good to say about going into the chute. Do you remember saying that?

A. He ran down the people that had conventional [p. 694] silos. The farmers that had to crawl up and down that chute, it was the most miserable thing they ever did on a farm.

Q. The stave silo that you have now, that has a chute --

A. Yes.

Q. -- that you go up and down. That is not a very pleasant task, is it?

A. Corn silage is altogether different than haylage. That's the difference.

Q. But as far as that representation is concerned, and I don't even know if it qualifies as a representation, but it's fair to say that that is not a pleasant task going up and down the chute on a cement stave hay unit.

A. That's true.

Q. And you don't have to do that with the Harvestore.

A. That's right.

Q. So that statement's true.

A. Yes.

Q. You mentioned that there was some representations about healthier cows, and I believe that you testified that you always felt you had healthy cows.

MR. BIRD: I object. I don't think that [p. 695] squares with his testimony.

THE WITNESS: I knew I had some problem with the cows, but I didn't -- when you work with them all the time, you see them all the time and all the time, I guess you get to the point you think this must be healthy.

BY MR. SHERAN:

Q. -- Is it your contention that using Harvestore feed does not result in healthy cows?

A. Are you asking me what I know now or what I knew then?

Q. What you know now. Let's start with that.

A. I believe it's not healthy for cows.

Q. And what factors -- first of all, what factors are you taking into account? What information do you have now upon which you base that?

A. By looking at the condition of my cows since they've been taken off of haylage or Harvestore feed and the health of them. It's day and night difference.

Q. Okay. So a comparison between what cows are like when on haylage to what cows are like when they're off haylage, that's the basis that you are now relying upon in determining in your own mind that the Harvestore does not result in healthier cows. [p. 696] Right?

A. Can you repeat that question again?

Q. I asked you -- you said what are you comparing -- strike that. You asked me -- strike the whole thing. I asked you whether or not you felt that Mr. Deutsch's representation that use of the Harvestore would result in a healthier cow or whatever it is that you said, whether or not you felt that that was false or true. And you asked me now or then, and then we went into what your thinking is now.

You told me, as I understand your testimony, that the reason why you think that that statement is false now is because now you've had an opportunity to compare a herd that is on haylage and a herd that is off haylage. You're able to compare the health of those two herds, correct?

A. Yes.

Q. Okay. And it's because your herd is now off haylage and in your opinion much healthier, as compared to what they were like when they were on haylage, that's the comparative basis that you're relying on in your decision that that statement is false.

A. Yes.

Q. [p. 697] Before 1974 your herd was not on haylage. True?

A. True.

Q. And so in 1974 you had the opportunity to make that comparison also, didn't you?

A. Yes.

Q. You could compare your herd health back in 1969 to 1974 to the herd health between 1974 and 1990 to get another comparison about what herd health is on or off of haylage, right?

A. Right.

Q. You made a representation that it was easier to get out in the field apparently, get out and chop at the early stage. I don't think I wrote it down exactly the way you said it, but do you know what I'm referring to?

A. Putting up haylage early?

Q. The way I wrote it down, and maybe I wrote it down wrong, one of the representations that Mr. Deutsch had made to you was that getting, or it's easier to get out and chop when the hay is at an earlier stage, the alfalfa is at an earlier stage. Did I write that down correctly or did I get that all screwed up?

A. Well, earlier stage in the growth? I mean, I guess you can make hay the same stage. I guess what I'm [p. 698] trying to say is you can start chopping earlier in the day than you can probably --

Q. Oh, okay. So is that a true representation?

A. Oh, yes.

Q. One of the representations that he made was that they would pay for themselves, and that was a combination of milk production and protein savings.

A. Yes.



Q. I guess we've talked about milk production. The way in which a dairy farmer -- you'll have to excuse me, because I've not no farm background, but as I understand your testimony, the way a person in your position, a dairy farmer would go about determining how much milk production he's getting would be to look at his DHIA records. Right?

A. That or compare your milk weights or your number of cows you're milking.

Q. Okay. But all of those things are recorded and those records are available to you throughout this entire period of time.

A. Yes.

Q. The other aspect of the pay-for-themselves representation was the protein savings, right?

A. Yes.

Q. [p. 699] How would a person in your position, a dairy farmer, go about determining how much protein they were or were not giving to their herd?

A. Repeat that again?

Q. Apparently one of the representations that Mr. Deutsch made to you was that you could reduce or eliminate protein supplement. Do you think that that's a true representation or a false representation?

A. Their representation was you could almost, very little or eliminate it. My feed samples that always came back, I always had to feed protein.

Q. Okay. So are you saying that that is a false statement?

A. Yes.

Q. The way a dairy farmer such as yourself determines whether or not it's necessary to feed supplement to the herd is by looking at the feed samples that you regularly get on the feed that you produce, correct?

A. Yes.

Q. And that's a record that's made available to you on a regular basis?

A. Couple times a year, yes.

Q. In 1974, 1975, 1976, throughout this entire period [p. 700] of time, a couple times a year a report was given to you which said to you, Mr. Klehr, you have to add supplement to your feed. Right?

A. Yes.

Q. Each time you got one of those records you were doing something that was contrary to the representation that Mr. Klehr had made to you --

MR. SCHMITT: Deutsch.

BY MR. SHERAN:

Q. Excuse me. That Mr. Deutsch had made to you about being able to eliminate protein supplement, right?

A. Repeat that last part?

Q. Every time you got a report that said to you, Mr. Klehr, you have to add protein supplement to your feed, you were getting a report that was inconsistent with the representation that Mr. Klehr had made to you that you weren't going to have to do that.

MR. BIRD: Deutsch.

BY MR. SHERAN:

Q. Mr. Deutsch. I'm sorry.

A. What I got back from my feed samples I believe was the result of the way I was putting up my haylage, that maybe I was not doing things right there. Not getting it in early enough. Maybe my field stands [p. 701] was not good enough alfalfa. Maybe I needed just to have a little better, cleaner fields or something. I never blamed it onto the feed that came out of that silo.

Q. Maybe you didn't blame it on that, perhaps you thought it was for other reasons. But you had a Harvestore on your farm; you had been told that you were going to be able to eliminate or significantly reduce protein supplement, and that never happened.

A. It never happened. I'd like to take a break.

(Brief recess.)

BY MR. SHERAN:

Q. Another representation that apparently was made was that there would be less spoilage.

A. Yes.

Q. Less spoilage as compared to what?

A. I believe less spoilage compared to a conventional silo.

Q. You now believe that that's not the case, is that correct? You think that's a false statement?

A. What I know now? Yes.

Q. What about the representation that you could mix any crop? That's the final of the list of representations that I understand that you claim

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[p. 709] you read either before or after your purchasing the Harvestore unit?

A. I believe that to be true.

MR. BIRD: Well, you mentioned the dirty task deal as another thing that he said.

BY MR. SHERAN:

Q. That's something that you agree with.

A. Yes.

Q. This lawsuit is not about the dirty task of going up and down the chute.

MR. BIRD: Agreed.

BY MR. SHERAN:

Q. Mr. Deutsch was, in your opinion -- was he, in your opinion, a conscientious salesperson in that he followed up after the sale was made to make sure that everything was going well on your farm?

A. Yes.

Q. And as far as you were concerned, as I understand your testimony, at least as far as your satisfaction with the Harvestore unit is concerned, you were satisfied with it and you believed that you were getting the production that you were supposed to get; you believed that it was sufficiently reducing your protein, as had been represented; you believed that your cows were [p. 710] healthier, or at least if they were not healthier it wasn't because of the, necessarily because of the Harvestore. You believed all of those things up until sometime in 1990, is that right?

A. Yes.

Q. Any when Mr. Deutsch came out to your farm before 1990 you never said to him, Mr. Deutsch, I'm not getting the milk production that you promised, right?

A. Correct.

Q. In fact, you never had any criticism at all about the Harvestore during that period of time.

A. Correct.

Q. And he never had any criticism of you either, did he? Let me correct that. There were times when you mentioned Mr. Deutsch and Mr. Johannes would come out to the farm and they would remind you about too long, too short, too wet, too dry, but I think you told us that that was not in your understanding any sort of criticism about the way you were managing, but merely to remind you that you should be alert to good management. Correct?

A. Yes.

Q. And no one else from MVBA, other than, or in addition to Mr. Deutsch and Mr. Johannes, no one

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[p. 712] MVBA personnel other than what you've now told me about?

MR. BIRD: I guess I'm unclear about the question. Are you talking about any contact at any time about anything or are you limiting it to this criticism area?

BY MR. SHERAN:

Q. I meant to confine the question to whether anyone came out and said, Marv, you're doing something wrong or you're not managing this thing properly. No one ever criticized you that way.



A. No.

Q. Now, I think that you said that it was 1990, in the fall of 1990, that Dick Deutsch came out and you told him at that time that you thought you were using too much protein and he said something to the effect, well, now your hard production is up much higher and you're going to have to use protein. Do you remember that testimony?

A. Yes.

Q. Was that in the fall of 1990?

A. I'd say yes.

Q. When is it that you determined, when you said that to Mr. Deutsch in 1990 when is it that you had determined that you were using more protein than [p. 713] you wanted to be or expected to be using?

A. The question was, it was not just me using more protein; it was the general feelings that I picked up over the years that other farmers were using more protein too. It wasn't just me.

When I asked him, I had said that I, talking to my neighbors and to my DHIA man, I asked them do other farmers feed that much protein, to Harvestore owners or anybody. And they all feed protein. So when I brought that up it was a general as to why other farmers or why everybody is feeding more protein. And he said, "Well, nowadays the production is much higher than it was when you built the silo, so that's why you are feeding more protein."

Q. And you don't mean to limit that to just Harvestore owners. Everybody in the dairy business seemed to be increasing their use of protein supplement. That's what you learned?

A. Yes.

Q. And you learned that from your feed man, is that right?

A. Well, or through the DHIA guys is where I mostly got it from.

Q. And this is the explanation for that, that [p. 714] Mr. Deutsch offered to you.

A. Yes.

Q. And then I think that you said at that same time you made a criticism, or not a criticism, but you said that you were not satisfied with your milk production at that time. And then you said Mr. Deutsch said nothing to you about that, is that correct?

A. That's correct.

Q. What was it about the status of your milk production in the fall of 1990 that was not satisfactory?

A. I felt that at this period in time that I should be much higher than I was.

Q. Where were you at that point in time?

A. Probably in the low 16,000.

Q. And where did you think you should be?

A. Watching my neighbors and everybody else going up and -- I felt I should have been superior to that.

Q. You should have been higher than your neighbors or you should have been superior to where you were at?

A. I guess I felt higher than what my neighbors were.

Q. You felt that you should be higher than what your neighbors were.

A. [p. 715] Neighbors or fellow DHIA farmers.

Q. And how do you keep track of what your neighbors' production is or what the DHIA, if it involved DHIA -- how do you keep track of where they're at?

A. The annual summary that comes out every year at that annual meeting.

Q. So each year you get some sort of a statement that gives you something to compare your level of production with either your neighbors or people that are also involved in DHIA generally, correct?

A. That's correct.

Q. And that is a document that was available to you in 1990. Right?

A. It's available every year.

Q. Going back to 1969 when you started dairy farming.

A. Yes.

Q. So that is a comparison that you could make in 1974, '75, '76, et cetera, correct?

A. Yes.

Q. But Mr. Deutsch didn't say anything to you about that.

A. No, he didn't.

Q. He didn't tell you that there was anything that you should do or that you shouldn't do that would change your production in any way.

A. [p. 716] No.

Q. Now, the next time you saw Mr. Deutsch was, I think you said June 22nd, 1991.

A. Yes.

Q. You're very specific about that date. I'm just curious as to why you remember that date so well.

A. Well, it's gone over in my mind many times, because this was about a couple weeks after we had signed our papers and filed our papers with the attorney, and we didn't know what the procedure for the lawsuit was or what happened.

Q. Mr. Deutsch came out at that time and he was unaware of the fact that you had started a lawsuit.

A. I got that feelings, yes.

MR. BIRD: Well, I think the record will reflect that the lawsuit wasn't started. At least I don't think your clients had been served until the 24th.

BY MR. SHERAN:

Q. But you had gone in to see a lawyer, and you informed Mr. Deutsch at that time that you were going to sue Harvestore and presumably MVBA because you were unhappy with the quality of your feed, right?

A. [p. 717] Yes.

Q. Either before or after you talked about that, was it before or after you talked about that that Mr. Deutsch told you that he thought that you weren't filling it fast enough?

A. The first comment I said to Mr. Deutsch was, "I was wondering how long it would take you to get here once the papers were served." The first comment I said to him was that, so he knew at that point that something was going on.

Q. He gets out of the car and you laid that on him.

A. No. He met my son by the barn first. They were standing there talking about the tractor. Steve was working on the tractor. And when they come walking towards the house -- I was putting my shoes on, this was about 1 o'clock in the afternoon -- and that's the first words I said.

Q. Okay. And then he said somewhere after that point in time that in his opinion you were not filling it fast enough?

A. Yes, that was the comment.

Q. And I think that you testified that he had never said that to you at any time before.

A. No.

Q. That's the last you saw of Mr. Deutsch, correct?

A. [p. 718] Yes.

Q. Stepping back for a moment to the advertising and representations, was there any information that you obtained in any of this advertising after 1974 that you weren't already aware of before 1974?

MR. BIRD: I'm going to object to that as being way overbroad and vague.

THE WITNESS: I would have to say that all the information I received afterwards was more or less just an update as to how everything was going. And basically I think I have read, or heard a lot of those things or seen those things before I bought the silo.

BY MR. SHERAN:

Q. Now, this Jim Dubbie, you mentioned a DHIA tester told you or was in your barn and told you that there was a lawsuit going on at that time?

A. Yes.



Q. So if we wanted to put a point in time as to when you had this conversation, it would be whenever that lawsuit was being tried.

A. Not tried. I think maybe filed. I don't believe the trial was going at that time yet, no. I'm certain not.

Q. Okay. So a lawsuit was going on, but perhaps not a

\* \* \*

[p. 761] all.

(Klehr Deposition Exhibits 39 through 47, inclusive, marked for identification.)

(Brief recess.)

BY MR. SCHMITT:

Q. Before this immediate short break you indicated that your farm tour of Ben Zweber's farm was not the deciding factor. Can you tell me what in 1974 you felt the deciding factor was?

A. I would believe that all the literature, the movies, what my salesman told me were my deciding factors.

Q. Well, what was it about the literature, the movies or the salesman's comments that was the deciding factor?

MR. BIRD: Well, I'm going to object to that as being overbroad. God, we've been at this for five and a half days and if you haven't defined that yet -- I mean, we're going into the whole thing over again, Dave.

MR. SCHMITT: No, Charlie, we're not.

BY MR. SCHMITT:

Q. Was there one factor out of all of the things that you learned from the literature, the movies, the salesman, was there one thing that was more [p. 762] important to you than the others?

A. I'd have to say the oxygen-limited. I believe that was the big deciding factor.

Q. And was there any -- strike that. At what point in time in 1974 did you rule out buying a concrete stave silo and decide to go with the Harvestore silo?

A. At what time? I couldn't tell you exactly what time, at what point I decided.

Q. And is there anything else about the oxygen-limiting factor that was important to you other than what you've testified to over the course of this deposition?

A. A lot of the features that they had said that they would do, convenience.

Q. Let me interrupt you a moment, because I didn't express that clearly apparently. Was there anything else about the oxygen-limiting factor specifically that was important to you other than what you've already said to us in your deposition testimony up to this point?

A. Anything else?

Q. Anything else.

A. Just that I was going to get better feed. That was my deciding factor. I wanted the Harvestore.

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[p. 1]  
STATE OF MINNESOTA DISTRICT COURT  
COUNTY OF SCOTT THIRD JUDICIAL DISTRICT  
CIVIL DIVISION PROPERTY DAMAGE

Marvin Klehr and Mary Klehr,  
Plaintiffs,

vs.

A.O. Smith Harvestore Products, Inc.,  
A.O. Smith Corporation, MVBA Harvestore  
Systems, Minnesota Valley Breeders Co-op,  
Midwest Breeders Co-op, and 21st Century  
Genetics Co-op,

Defendants.

DEPOSITION OF RICHARD DEUTSCH

DECEMBER 14, 1992

\* \* \*

[p. 48]background, go ahead and try.

A. So your question was what?

Q. Well, my question was, based upon your knowledge and understanding as a salesman, are you aware of any significant product changes in the Harvestore structure from whenever you started selling silos up to 1984 or '85, when you stopped selling the silos?

MR. SCHMITT: Reflect my objection, please.

A. I would say no.

Q. The Harvestore silo, how does it work, based upon your knowledge and understanding as a salesman?

MR. SHEPARD: Same objection. I also object, the question is vague.

A. I don't know exactly how to answer that, or what are you getting at specifically when you say how do they work?

Q. Well, the Harvestore silos, as I understand it, you correct me if I'm wrong, but are oxygen limiting silos, are you familiar with that?

A. That's correct.

Q. You believe that, don't you?

A. Yes, I believe that.

Q. You think they're the best silo on the market?

A. Yes, I believe that.

Q. You think they're the Cadillac of silos?

MR. SHEPARD: I'm going to

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[p. 56] MR. BIRD: -- get a court order.

MR. SHERAN: If you are going to continue to interchange phrases like that which you know are central to this litigation, then we're going to terminate the deposition.

MR. BIRD: Why don't we read back the last two questions. And I don't think I used oxygen limiting as part of either of those two questions. You go ahead, read those last two questions and answers back.

(Whereupon, the requested portions of the deposition were read out loud by the court reporter.)

Q. Now, we've had all this discussion now, and the question was read back. Can you answer that question?

A. The breather system was explained to them, yes.

Q. What do you consider to be part of the breather system?

A. Well, the breather bags themselves, and that's about it, I guess.

Q. Is the pressure relief valve part of the breather system --

MR. SHEPARD: I'm going to object for lack of foundation.

Q. -- based upon your knowledge and understanding of that term?



A. They are there, again, for the reason that I told you a little while ago about if there is quite a temperature [p. 57] change in atmospheric pressure.

Q. And what I'm asking you is, when you used the phrase breather system, you said you explained to them the breather system, I was trying to find out what you encompassed within that phrase, breather system, you said the breather bags. Now, was the pressure relief valve part of that breather system that you explained to them?

A. Yes.

Q. All right.

A. Yes.

Q. Did you explain to them about the unloader door and closing the unloader door, is that part of the breather system?

A. No, that's not part of the breather system. But the reason people purchase Harvestore is the understanding that we're trying to keep as much oxygen away from the feed as possible, so I guess it's just kind of good common sense to close the door when you're not unloading or close the filler latch if you are not filling.

Q. Now, if a farmer gets bad feed out of a Harvestore silo, what is your understanding of the reasons why, possible reasons why they would be getting bad feed?

A. There could be different factors. Breather bags might leak, the type of feed put into the structure, the amount of feed put in at any given time, or plain management.

Q. [p. 58] Anything else?

A. Structure could have a leak in it.

Q. Any other reasons?

A. Not that I can think of.

Q. Now, breather bag leaks, is that a repairable problem?

A. Yes.

Q. And the structure leak, is that something that's also repairable, to your knowledge?

A. Yes.

Q. And you talked about management as being a potential cause for bad feed. Were two examples of that the feed that you put in and the amount that you put in, is that part of bad management?

MR. SHEPARD: Let me object, I don't think he used the term bad management, I think that's your term.

Q. Okay. He used the word plain management. I think you were implying if the farmer isn't using the silo correctly then he can get bad feed out, is that what you intended to say?

A. Under certain conditions, that could be possible.

Q. And what are some of those management factors that can adversely affect the quality of the feed?

A. Again, the type of feed he puts in, and probably the

amount of feed he puts in at any given time, if he closes the hatch on top or let's it open for three, four days or [p. 59] a week, and also if he closes the bottom door after he's done unloading.

Q. Now, what did you mean by the type of feed going in?

A. Well, if you put poor quality feed in you get poor quality feed out, I would assume.

Q. Now, when you're talking poor quality, what do you mean by that, low protein feed or --

A. Well, there is occasions where people have, according to the weather conditions, probably there could be a lot of grasses or wheat because for one reason or another they seem to keep growing, when it gets too dry alfalfa struggles. So the comparison of feeds versus alfalfa could make it a poor quality feed. The length of period of time the feed has laid out there sometimes being very long could also affect the type of feed coming out.

Q. How about if it was too wet or too dry?

A. Those are also factors.

Q. Is there such a thing as cutting the feed too late?

A. That's a factor, definitely.

Q. How about improper chop?

A. You know more about this than I do. But this is a factor.

Q. And then you mentioned the amount that you put in at any time. What did you mean by that?

A. Well, if the structure was, say, quite empty, and if a

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Q. [p. 67] Have you ever looked inside a 25-footer to look at the dome?

A. Not that I can recall.

MR. BIRD: Let's take a break.

(Whereupon, a recess was taken.)

Q. Ready to go? I got to go back and hit a few points that I missed. Did you ever review any of the internal research of either A.O. Smith corporation or A.O. Smith Harvestore Products Incorporated in relation to Harvestore silos or unloaders or how they work?

A. No.

Q. You talked about the fact that farmers told you good things about Harvestores, how they were having good results with their Harvestores, do you recall that?

A. Yes.

Q. Did you have people that were not satisfied or were unhappy with the Harvestore silos as well?

A. I think about 99 percent was very positive.

Q. Can you give me the names of some of those that were not happy with their Harvestore silos or feed coming from them?

A. Roland Ryan wasn't at the time, Jim Dubbe, and of course Marvin and Mary Klehr.

Q. Any others that you can think of?

A. Not that I can think of.

\* \* \*

[p. 71] question.

A. I would say that that was part of it, yes.

Q. Would you expect that the farmers would believe the material that they read that you had dropped off at the house, and believe the information contained in the films?

A. If I didn't believe that I would have never given it to them.

Q. You never would intentionally try to misrepresent a product?

A. No, sir.

Q. If you had obtained information that Harvestores, through normal daily unloading, admit significant amounts of air into the dome underneath the feed, would you have informed the farmers of that information?

MR. SCHMITT: Objection, improper hypothetical.

MR. SHEPARD: I'm going to object, it calls for him to speculate. I'm also going to object, the question assumes facts not in evidence.

MR. SHERAN: You're asking him to speculate what he would have done under a scenario?

MR. BIRD: Different set of circumstances.

MR. SHERAN: If something like that occurred, you want to ask him what he did, that's fine.

\* \* \*

MR. BIRD: I'm asking him to answer a [p. 73] significant amounts of air came into a Harvestore silo through the unloader door during normal daily feed-cuts in quantities that were large enough to harm the feed, would you, as part of your business ethics, tell the farmer of that information?

MR. SCHMITT: Same objection.

MR. SHEPARD: Same objections.

A. I don't know how to answer that.

Q. What problem do you have with it, why are you confused?

A. The way I understand the question is if that information was available -- I have no information like that.

Q. I'm asking you to assume that you came upon that information, that's all I'm asking you. I'm asking you a hypothetical question. Assume that you learned that. I'm not asking you to agree that it's true, I'm asking you to



assume that, you learned it, would you feel it necessary to tell the farmer about that?

MR. SCHMITT: Same objection.

A. Yes, if this was true.

Q. Why would you feel it necessary to tell the farmer about that?

MR. SHERAN: Same objection.

MR. SCHMITT: Continuing objection to the question which is based upon an improper predicate and improper hypothetical, calling for speculation on the

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A. [p. 79] I would have to say yes.

Q. Would those be meetings where you would be in attendance?

A. Yes.

Q. Now, what were the sorts of things that were discussed at those meetings?

A. Well, we'd generally have a owner of Harvestores that would be probably the top speaker.

Q. Okay. What would they talk about?

A. The results they had in using their Harvestores.

Q. Their personal experiences?

A. Yes, sir.

Q. Would you have any other types of speakers?

A. Occasionally we did, yes.

Q. People like who, can you give me the names of some of the other speakers?

A. Well, I know Dr. Knodt talked at a couple of them.

Q. Howard Larson?

A. I just can't recall any of the rest. It was different ones.

Q. How about George Marks?

A. Yes.

Q. Lee Kilmer?

A. I can't remember.

Q. Wally Waas? He's from Iowa State at Ames.

A. I don't think that we ever had him for a meeting.

\* \* \*

[p. 95] MR. SHERAN: He's asking you if you ever made that representation.

A. No.

Q. Did you represent that the air coming in through the unloader door during unloading was a very small amount,

and because it would be quickly converted to a harmless gas it would not harm the feed?

A. Probably, yes.

Q. Would that be a true statement, in your opinion?

A. Yes.

Q. And is that based upon your education and training from A.O.S.H.P.I.?

A. Probably. Again, I'd have to say probably that source I would have got from that USDA bulletin that any oxygen to get in contact with feed would use up respiration of the plan and fermentation, be converted to carbon dioxide.

Q. You say that's in that USDA bulletin?

A. Yes.

Q. I just want to make it clear, you know what I'm talking about when I say A.O.S.H.P.I. --

A. Yep.

Q. -- I'm referring to A.O. Smith Harvestore Products Incorporated? Did you represent that any air coming into a Harvestore could only enter because of a repairable problem or due to improper management of the silo?

\* \* \*

Q. [p.97] Why is that?

MR. SHEPARD: Same objection.

MR. SHERAN: I join in those objections. He can answer the question, but now you're talking about a speculative situation.

A. If I didn't in my own mind believe that the Harvestore structure works, I would not be selling Harvestores. And the reason I am selling Harvestore to this day, I've been going at it for 25, 27 years, is because of the results that I have gotten from people that have used Harvestores, they have increased production, increased test, eliminated a lot of work, and told me they wished to God they could have bought them sooner.

MR. BIRD: I move to strike as not responsive.

Q. What I asked you was, if you had learned of the fact, and assuming it's true, that there was an unrepairable design problem with Harvestores and air coming into the silos, would you have told the farmer about that, and you said yes, I would have. Now I'm asking you why would you have done that?

MR. SCHMITT: Same objections.

MR. SHEPARD: Same objections.

A. Because I'm no crook.

Q. What did you understand the relationship to be between A.O. Smith Corporation and A.O. Smith Harvestore Products

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[p. 154] MR. BIRD: Some of those he said he did recollect giving to them, some of those he said he didn't

recollect one way or the other, some he said he didn't. The question goes to those that he recalled.

MR. SHEPARD: I have my objection for the record.

Q. Okay. I think you answered the question?

A. Yes.

Q. With respect to those brochures that we talked about where you indicated that you gave those to the farm customer, would you expect that the customer would consider and believe the information contained in those brochures?

A. Yes.

Q. And did you consider the information in those brochures to be reliable information?

A. Yes.

Q. Do you have a recollection of ever representing to Marv and Mary Klehr that mold would not be a problem in their -- the silo they purchased in 1974?

A. The only thing I might have said about any mold was if -- say for instance you filled that Harvestore half full, in between fillings you will experience a small layer of mold.

Q. And anything more than that they shouldn't experience

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Q. [p. 156] During the years that you went out to the Klehr farm, from 1974 to 1984 or '85 and whenever you stopped working for MVBA, do you recall the Klehrs being happy and satisfied with their Harvestore silo? I'm talking about the haylage unit now.

A. Yes, it appeared that way.

Q. Do you recall that sometime in the late '70s, early '80s, Harvestore came out with a new sealer, 79 Sealer they called it?

A. Yes.

Q. And do you recall that there was a program free of charge to the customers where the dealers would go out and apply the new sealer to the side of the silos then pressure test them?

A. Yes.

Q. Do you know whether or not that was done to the Klehrs' silo?

A. I believe it was.

Q. What was your understanding of the improvement that was made by virtue of the new 79 Sealer?

MR. SHEPARD: I'll object, lack of foundation.

A. Well, I would just think that it was better to know when they were using it.

Q. Do you recall that they were using tape sealer in '74?



A. Yes.

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[p.178] where Marvin Klehr complained to you about some sort of problem with his feed from the Harvestore silo in 1990 or 1991; is that correct?

A. Yes.

Q. And as I understand your testimony, that is the only time you recall Mr. Klehr complaining to you about the Harvestore silo or the feed that was coming out of it; is that correct?

MR. BIRD: I object to that as leading and suggestive.

A. Yes, that's --

Q. Before that visit to the farm in 1990 or 1991, I understand you had been to the Klehr farm on several occasions; is that correct?

MR. BIRD: Object to the form.

A. Quite a few years earlier, yes.

Q. And you had been on the farm going back to how far?

A. Had to be before '80 -- I can't remember exactly when I left MVBA.

Q. You had been on the farm going back to at least 1974; is that correct?

A. Yes.

Q. And before you sold the Harvestore silo to the Klehrs in 1974, had you made periodic visits to the Klehr farm?

A. Yes.

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[p. 180] MR. BIRD: Objection, form, argumentative and leading and suggestive.

A. Yes, I talked to him a few times.

Q. And none of those prior occasions before 1990 did he ever complain to you about problems with quality of the feed in the Harvestore silos; is that right?

MR. BIRD: I'm going to object to that, that misstates his testimony. He said during the time frame before the sealer he had no recollection one way or the other.

Q. Go ahead and answer it.

MR. BIRD: I object to the form of the question.

A. I could not remember, no, I could not remember that he did.

Q. Am I also correct, you had the opportunity to observe the feed in the haylage, 1974 haylage unit on more than one occasion before 1990; is that correct?

A. Yes.

Q. And during any of those visits did you notice anything unusual about the quality of the feed?

A. I don't think so.

Q. Approximately how many farmers would you say you have sold Harvestore silos to over the length of your career at MVBA?

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GEORGE MARX,

[p. 3162] called as a witness, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MORRIS:

Q. Good morning, Dr. Marx?

A. Good morning.

Q. Dr. Marx, would you identify for the jury where you live: What your address is?

A. Yes, my address is 401 Jefferson Avenue, Crookston, Minnesota.

Q. And, Dr. Marx, are you married and have a family?

A. Yes, I am.

Q. Would you describe for the jury, please, how many children you have and their ages?

A. Yes, I have two children, one's 22 and one's 24. And I've been married to Elizabeth, my wife, for 26 years.

Q. Dr. Marx, you're currently on the faculty of the University

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[p. 3272] operating Harvestore equipment?

A. Well, we utilized the Harvestores, of course, for feed and

feed preservation prior to that time.

Q. The university had, in fact, been involved in some Harvestore research before 1970?

A. I'm not quite sure what you mean by "Harvestore research."

Q. I'm not sure, either. There was an understanding -- an agreement of understanding, or something like that, back in the mid-60's between the research facility at Minnesota and A.O. Smith Harvestore Products, Incorporated?

A. Well, I believe that's right, because we have a number of memorandums of agreements with various types of manufacturers, or people that are working with us.

What it primarily says is that the university has the right to publish whether it's positive or negative, and the regular memorandum of agreements that universities have.

Q. Right. And that was back in the 60's. I don't know if you had any -- did you have any direct contact with A.O. Smith Harvestore Products back at that time?

A. Well, I came to Crookston in 1954, and so if that's the date you're talking about, yeah, we've had contact with their director of research, for example. I suppose that was the first contact I've had with them.

Q. Okay. And in 1970, you attended or wrote a paper or gave a

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Q. [p. 3275] It was a haylage conference that was at

Winnipeg, Manitoba, Canada, in '74. It's about --

A. Yes, that's correct, I delivered a paper there.

Q. And on the next page, page five, there's one that says, "Management Considerations in Milk Production"; "Management of Reproduction in Dairy Cattle"; "Feeding and Management of Dairy Cattle and Replacement Heifers"; papers presented at the AOSHPI Seminar in the Sun, San Diego, California, February 10th through 13th, 1975; is that correct?

A. Yes, that's correct.

Q. Were there prospective purchasers of Harvestores at that meeting, or any of the other two meetings or three meetings that we've talked about?

A. Most of the people in terms of this dairy management series were dairymen that were there to obtain new information on haylages and high-moisture grains and management of their herd.

Q. So, these were dairymen that were there at these meetings?

A. Yes.

Q. Dairy producers?

A. Dairy producers.

Q. At the seminar in the Sun?

A. Yes.

Q. Okay. Report -- then just below that, there's a report



presented at the Minnesota Harvestore Seminar, Alexandria, [p. 3276] January 3rd and 4th, 1975, and the Wisconsin Harvestore Seminar at Madison on March 11 and 12, 1975. Are they local meetings?

A. Well, I don't know what you mean by "local," but they were --

Q. Were those for Harvestore dealerships?

A. They were also put on for dairymen.

Q. Were they for Harvestore dealerships, put on behalf of Harvestore dealerships?

A. I'm sure the dealerships were involved in this as well as the state.

Q. Were these meetings that dairy farmers and producers came to, whereby the dealership or AOSHPI was attempting or promoting their product, trying to sell Harvestore structures?

A. I don't believe so. This was their annual winter meeting, both in the case of Minnesota and Wisconsin, they were similar meetings, and dairymen attend these.

Q. Was the Seminar in the Sun, was that a meeting for salesmen of Harvestore structures?

A. No, it's a meeting for, primarily, dairymen. There are salesmen there, of course, but it's primarily for the dairymen.

Q. On the next page, sir, there's a -- on page six, it's a 1976, says, "AOSHPI Barley Bulletin," April, 1976. What [p. 3277] was that?

A. That was a bulletin that we put our high-moisture barley research -- some of the research data was in that particular bulletin.

Q. And that bulletin was prepared for AOSHPI to send or to present to prospective purchasers of Harvestore products?

A. Well, it was research that we did that was put in their particular newsletter or their bulletin. They call it a bulletin.

Q. So, that wasn't contained in one of the promotional literatures that A.O. Smith Harvestore Products produced?

A. Well, I don't believe that it would be called a promotional item. It's their bulletin or their newsletter. It's full of other information that's been developed or that's been researched from not only Crookston at the University of Minnesota but from other universities.

Q. Okay. Your material has been -- your writings have been used in promotional materials produced by A.O. Smith Harvestore Products, Incorporated; is that correct?

A. Well, they've been used in some of their materials. I don't know if you'd call it promotional materials.

Q. I noticed in one of the documents that the Kronebusches got, this says, "Research Report on Haylage, A Complete Short Course" - this article right here - now, this is a promotional bulletin and literature; isn't it, sir?

A. [p. 3278] I would call that primarily an educational bulletin. In fact, it's fairly good. It has a lot of research information from many, many universities and other professors, along with my article.

Q. Yes, sir. And it also has some promotional materials in it,

doesn't it?

A. Well, I'd have to look at that to see what you're talking about in terms of promotion.

Q. Okay. But in any event, of course, you have an article in it, and that's your picture there.

A. Yes.

Q. The document that you put in earlier -- now, this bulletin here was put out in 1975; is that correct? I mean, that's the copyright date.

A. Yes, that's correct.

Q. And the exhibit that you put in earlier, in your direct testimony, it's out of a magazine dated April of 1990; isn't that correct?

A. Yes, that's right.

Q. Progressive Dairyman, 1990?

A. Right.

Q. But in fact, the material that's contained in the 1975 haylage brochure is the same research that is again reprinted here in 1990 in this magazine.

Yes. Effectively, it's the same research. It's a little

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[p. 3282] standing there in front of the Harvestore structures and -- no, you were sitting at a desk, excuse me.

You knew that it was going to be used for the purposes of promoting the Harvestore structures; did you not?

A. Well, I knew they were going to use it for educational purposes.

Q. In the document that you --

THE COURT: Excuse me, Counsel. Now I'm about five minutes to break.

MR. VICK: Yes, sir.

Q. (By Mr. Vick) I forgot one thing, Dr. Marx. You did also -- for A.O. Smith Harvestore Products, Incorporated, you did condense literature for them; is that right?

Q. Yes, I have done some of that.

A. One of the things -- you've been in contact, let's say, with A.O. Smith Harvestore Products, Incorporated, since 1970, doing various things, some of which has been testifying or serving as an expert witness on their behalf since the early 80's, but you never have reviewed any of the A.O. Smith Harvestore Products, Incorporated, internal research and development, have you, sir?

A. I haven't. I don't have access to that.

Q. You don't have access to it?

A. No.

Q. [p. 3283] You never have reviewed any of A.O. Smith Corporation's internal research and development documents?

A. Not their internal documents.

Q. Their R and D, where they've done testing on the Harvestore structures?

A. That's not my line of work in terms of reviewing engineering, or whatever you're talking about.

Q. Talking about where they've done engineering and tested the feeds, and just tested the performance of their structure, and tested some -- some test animal performance of their structures. You never have reviewed any of those things, have you, sir?

A. No, I haven't.

Q. And you never have reviewed the internal memoranda that may go back and forth between people that work for A.O. Smith Harvestore Products, Incorporated?

A. No, I haven't. That's really not my area to review.

Q. Certainly they would know more about the way that a Harvestore performs than you do; is that correct, sir?

A. Well, I assume they do. They worked with -- or had been working with it for many years.

Q. And they would be more aware of complaints that may have been made about their product, about how it performs, than you would; is that correct?

A. Oh, I don't know if they get complaints or not. I have no

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## WILLIAM JOHNSON

[p. 2153] Walvcord was hired as the full-time manager at that time, and in answer to your question, he had no better luck than I did. In fact, not as good, frankly.

Q. What did you do after you got out of the Jamieson Ranch, then?

A. Almost coincidental with our decision to shut down, Paul Conrad's father, who was his partner in Conrad Sales Storage, became seriously ill, had to -- went back to Indiana, very shortly after died, but Harvestore had a rule that there had to be two or more parties in a dealership, Paul invited me and another Harvestore operator by the name of Hettrick -- L.A. Hettrick to come into the dealership with him, and just about the end of '63, early '64, we agreed to do that.

Q. So, you became a Harvestore dealer?

A. Yes.

Q. If you had bad luck with your Harvestores, why did you ever become a Harvestore dealer?

A. That's a good question and one that I think every man that owns a Harvestore has to face some day. You buy these things with great hope, great expectations, you are buying the Cadillac, and when it doesn't function properly, you blame yourself because you can't manage it.

You have to go through quite a process to get from the stage where you worship these things until you look at [p.



2154] them critically and start taking them apart and analyzing their faults, and still, at this period that I joined Conrad, I blamed myself as a manager rather than the structures. Couldn't conceive of these big, beautiful, expensive structures having fault.

Q. At the time that you became a Harvestore dealer, did you still believe in Harvestore?

A. Say again, please.

Q. Did you still believe in Harvestore?

A. Oh, yes, very definitely. Very much so.

Q. Now, did you get any sort of training from Harvestore with respect to Harvestore sales?

A. I didn't go through the normal training sales procedure because I'd had four years exposure to it, plus a dealer who was very moxie and had transferred his information to me. I'd read all the literature. I believe I got more out of what they call the dealer council meetings, which was an annual meeting of all the dealers in the United States where -- where an organized program is presented, and you learned a lot from dealers' firsthand experience and informal meetings. You just learned a great deal from exchanging experience with other dealers.

Q. Where was the dealership when you first joined this dealership? What area did it cover?

\* \* \*

A. [p. 2167] Correct.

Q. When you went into the room, did you have a presentation that you were wanting to give?

A. Yes, we did.

Q. What was the presentation and how did you organize it?

A. We divided it into three parts. I took the first part on what had happened, what had brought us up to his stage, how we'd make these discoveries, the reaction of the owners in California.

Paul Conrad took the center segment of where we stand now, the problems we're facing today and what we're asking you to do.

Hettrick took the third part of where we thought things were going to go if they didn't respond to this problem.

Q. What was it that Hettrick said about what was going to happen if they didn't respond to the problem?

A. He said if the company didn't get out there and work with us as dealers and with the owners, that there was going to be massive litigation. A lot of owners were just on the brink of filing litigation. If they didn't come out and address the problems, there would be litigation.

Q. What did Mr. Hyde say in response to that?

A Mr. Hyde said, "No little California farmer can whip a big corporation." I'll never forget that as long as I live.

Q. [p. 2168] How did you react to that?

A. I -- frankly, in total shock. I couldn't believe the company would take that attitude. The hell with the farmers in California, let them sue.

Q. Why were you shocked by that statement?

A. It wasn't typical of A.O. Smith or A.O. Smith Harvestore Products. They'd been a customer-oriented, dealer-oriented corporation, always seemed to be wanting to work with people, help them, and this was just a total shock to me that Mr. Hyde wasn't the least concerned. Let them, sue, they can't beat a big corporation.

Q. At some point in time, was there discussion about sending someone out?

A. Well, we persisted. We kept begging them to address the problem. We would work with them, the farmers would work with them if they'd come out and make a concrete effort to correct the situation.

So, finally Art Hyde turned to Howard Johnson, the engineer, and said, "Howard, grab your hat, pack your bag, get out there to California and find out what's wrong."

Q. And what did Howard Johnson say in response to that?

A. Howard turned to him and he said, "Art, I don't have to go to California to find out what's wrong. I know what's wrong, and you would know what's wrong if you read the bulletins I put on your desk."

\* \* \*

[p. 2170] situation by making personal appeals to either A.O. Smith or AOSHPI?

A. We did a couple of things. We wrote a certified letter to every dealer in the United States telling them of our problems, cautioning them that every structure they sold was a potential liability, and asking them to join us in cleaning up this mess. We visited -- made a tour through the country and visited every dealer that we could find that would talk to us. We went to Milwaukee and arranged a meeting with Ted Smith, the president of A.O. Smith Corporation.

Q. All right. Let's talk about that. Ted Smith at the time was what? What was his position?

A. He was President of A.O. Smith.

Q. A.O. Smith Corporation.

A. Right.

Q. So, now we're not dealing with AOSHPI anymore, you're going to the big company in Milwaukee?

A. Correct.

Q. And what did you do to try to arrange this meeting?

A. We made phone calls, wrote letters, and we were just persistent. We finally showed up on the front door and he did allow us in.

Q. Did you have a meeting?

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A. [p. 2172] It would have been late spring -- as close as I can come, some time late spring of '65. I'm a little fuzzy on that date.

Q. What was the tone of that meeting?

A. Well, our presentation was, we don't understand why AOSHPI is acting the way they are.

Q. Who's Art again now; Art who?

A. Art Hyde. We were concerned that the hirelings down there weren't telling the parent company what was going on. Their action was so atypical we thought they were hiding this thing and sweeping it under the carpet.

We wanted to make sure Ted Smith and the company was aware of the problem. We thought we might get a more favorable response from our past experience with Ted Smith and A.O. Smith Corporation. They both had superb reputations, and had been very supportive of the whole Harvestore program, and we couldn't understand why all of a sudden they'd taken this negative attitude.

Q. And -- what was the result of the meeting?

A. Well, he assured us that he had been kept informed. He appreciated our bringing this information firsthand to him. He made us no assurances that anything different was going to be done that had.

He just acknowledged that he was informed, had been kept informed, and, frankly, nothing was gained other

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Q. [p. 2174] the conversation?

A. In the men's rest room during the morning break during depositions.

Q. What did he say to you?

A. He said, "Do you fellas understand that if you do prevail, that we can appeal this thing and drag it out for years and years and years? Are you prepared to wait?"

Q. Was Mr. Conrad -- who was in the rest room with you?

A. Hettrick and Conrad and I, and Mr. O'Neil, and Doc answered him right straight off the shoulder. He said, "If we go down the road with the mattress on top of the car, Ted Smith is going to go down the road with a mattress on top of the car."

Q. And did the attorney say?



A. He said, "How do you propose to do that?" and Doc said, "If they're going to break us, we're going to break them, it's that simple. There's no justice involved here, it's who's got the biggest club, and if you're going to break us, we're going to break you."

Q. And did you do anything in response to that, then?

A. The following week, Hettrick and I started out on a trip through Southern California and Arizona. Paul Conrad was unable to come, he was going back to his father's funeral, but Hettrick and I started down through Southern California, talked with the dealers, every owner that we [p. 2175] could locate.

Q. What were you trying to do?

A. We were trying to solicit some support. We thought the more people we could get involved in this, the better idea they'd have of how serious it was. And in a very short time, lawsuits started pouring in at a great rate from people we had talked to down there in Southern California and Arizona.

Q. What did A.O. Smith and AOSHPI do in response to your going down and telling other farmers what the problem was?

A. They got an injunction against us in a court in Arizona, enjoined us from talking to owners or prospective customers, or making derogatory remarks about A. O. Smith or A.O. Smith Harvestore Products.

Q. Did you ever go to a court hearing where that injunction was discussed?

A. I don't know how they obtained it or anything. It was handed to me by my counsel, and I know nothing about the proceedings that led to it.

Q. Do you know if it was an injunction, temporary injunction, permanent injunction or temporary restraining order?

A. I do not know.

Q. Do you know what the specific terms of it were?

A. Well, specifically, our counsel told us, cease and desist from talking to Harvestore owners and dealers, or

\* \* \*

A. [p. 2225] But, they just reported the good part and buried the last, and that's why I remain to this day highly skeptical of university reports. I don't know how often this happens but I know firsthand of one case that I spent a ton of money on where I was hurt by their burying information, and that's why I'm so antagonistic, I guess, about certain academicians.

Q. Now, Mr. Morris also asked you about the fact that you might have bitter feelings towards Harvestore. When you found out that there was a problem with Harvestores, did you continue to sell Harvestores?

A. No. When we -- when we saw the light, we just flat stopped selling.

Q. When you found out there was a problem with the Harvestores in the 60's, what did you do about trying to tell other farmers about the problems with Harvestores?

A. As I say, the grapevine was pretty well informed that there were problems, but we made sure that they did understand that there was a problem, that we were pursuing it with the company, and trying to get them to come out and help us rectify the problems.

Q. When Harvestore found out there was a problem in the 60's, what did they do about continuing to sell Harvestores?

A. Well, obviously they continued to sell them, and my impression was, they buried their head in the sand as to [p. 2226] our problems in California.

Q. The only place they stopped selling was the State of California?

A. To the best of my knowledge.

Q. What did they do, that is, Harvestore, about informing farmers in other parts of the country about the problems that had been experienced in California?

A. They sure didn't inform them.

Q. Well, you got an injunction.

A. We were told to stop -- we -- yes, we were enjoined about telling other farmers about it.

MR. BIRD: That's all I have.

THE COURT: Anything further, Counsel?

MR. MORRIS: Yes, sir.

RECROSS EXAMINATION BY MR. MORRIS:

Q. Just so we get the record absolutely, completely straight, this isn't the first time you've been asked to testify, is it?

A. I have been called before. Nothing has come of it.

Q. You haven't been, for one reason or another, put on the stand?

A. I have never been on the stand.

Q. I also wrote down that when I asked you the question about whether that was a Midwestern university, you told me South Dakota, and in response to the questions by Mr. Bird, you

\* \* \*

### AWARENESS OF CONDITIONS

1. High moisture grain will not keep in Harvestore in Calif.
2. High moisture grain will not unload from a Harvestore with a sweep arm auger.
3. Forages deteriorate in partially filled Harvestore structures.
4. Damaging temperature build-ups occur within feeds stored in Harvestores.
5. Alfalfa stored as haylage in Harvestores does not give satisfactory results.
6. California feeding results do not support performance as represented by AOSHPI.
7. Failure in operational performance has created a hostile attitude in banking institutions and has resulted in withdrawals of normal credit extension to Harvestore owner.
8. Legal action is pending due to substantial extensive financial damage resulting from product failure.

\* \* \*

### RECOMMENDATIONS

1. Adapt structure to assure sealed storage.
  2. Replace sweep arm augers with chain unloaders in all grain structures.
  3. Develop a reflective surface on the exterior of the Harvestore structure to reduce heat absorption, thereby diminishing temperature variation within the structure.
  4. Develop and document haylage and high moisture grain feeding programs adapted to California conditions.
  5. It is imperative that AOSHPI inform present owners of Harvestores in California of their awareness of the conditions existing in California, and assure these owners of the company's intent to rectify this situation. Such a company policy will also assure dealers sales personnel and their prospects that they can proceed with the installation of Harvestores, knowing the product is backed by the integrity of AOSHPI.
-



[p. 3] WILLIAM WALLACE SMITH, JR.,

called as a witness, being first duly sworn, was examined and deposed as follows:

DIRECT EXAMINATION

BY MR. McCUNE:

Q. Could you state your full name for the record, please?

A. William Wallace Smith, Jr.

Q. And where do you live, Mr. Smith?

A. 1418 West Weathersfield, spelled like it sounds, Way, Schaumburg, Illinois.

Q. How old are you, sir?

A. 48.

Q. Okay. And with whom are you employed?

A. A. O. Smith Harvestore Products, Incorporated.

Q. What is your position with A. O. Harvestore?

A. Vice-president of Product Engineering.

\* \* \*

[p. 20] under a good structure, you would not expect significant amounts. You're talking about a molecule here and there as opposed to something that could be significant.

Q. When you say a molecule, you're not talking in terms of several hundred cubic feet of air a day?

A. No.

Q. Okay. If the seams were all appropriate, then you've got three categories where you're going to expect some sort of gas exchange, that would be during the loading process, and I assume, anytime the farmer looked in to inspect the --

A. That's right.

Q. -- the system. During the unloading process through the unloader door?

A. (Moved head up and down.)

Q. And through the relief valve?

A. Yes.

Q. Correct? Now, are you aware, does A. O. Smith Harvestore products have the ability or capability to predict the amount of air that will be exchanged through the relief valve under given climactic conditions?

A. No.

Q. Does A. O. Smith Harvestore Products Incorporated have the ability to predict the amount of [p. 21] air exchange that will take place through the unloader door during a given set of circumstances regarding the unloader process?

A. No, we do not.

Q. Now, during the loading process, that's done by blowing feed into --

A. Yes.

Q. I assume you can predict how much air will end up in the system under those circumstances pretty well, can't you?

A. Not accurately, no.

Q. Wouldn't you pretty well get a whole silo that will be basically ambient air when you finish that loading process except for the space occupied by silage, obviously?

A. Yes, and there's quite a bit of oxygen gasses within the silage itself, and that has not lent itself to prediction.

Q. Okay. I take it also there is no way A. O. Smith Harvestore Products Incorporated can predict the amount of air that will be exchanged through leaks you find in the average structure on a given dairy farm?

A. Not over a period of time.

Q. Okay.

Q. Now, the term oxygen limiting is used with [p. 22] regard to the Harvestore structures, is it not?

A. That's right.

Q. That term, that description of the Harvestore structure is not based on any study that determines how much oxygen actually gets to be volume, gets to the ensiled mass during any storage period, is it?

A. It's not based on a study on oxygen, an accurate study showing the amount of oxygen that gets to the silage. It's based primarily on studies that have been made, first general logic that by sealing the structure and doing what has been done, that you are limiting the oxygen and, two, the results of the system which have proven time and time again that it is effective.

Q. Well, the answer to the question is that representation is not based upon any study that indicates the amount of oxygen that actually accesses the feed during the process, correct?

A. Far as I know, that is correct.

Q. How, when the air does get in, when oxygen does come in contact with the feed, there are reactions that will take place with the feed that can take place only in the presence of oxygen; is that correct?

A. I understand that's correct. That's

\* \* \*

Q. [p. 52] Is the design of the breather bags -- first of all, is "breather system" a term with which you're familiar as it relates to the Harvestore, for example?

A. We use that term in a general sense.

Q. What does the breather system refer to?

A. The breather bag is a total system.

Q. Does the breather system include the relief valve?

A. Yes.

Q. So, when we're talking about the breather system of the Harvestore structure, we're talking about the breather bags and the relief valve?

A. Yes.

Q. That basically is the breather system, isn't it?

A. Yes.

Q. Now, does, to your knowledge, Harvestore represent that that breather system prevents oxygen from coming in contact with the feed?

A. Of course not.

Q. Okay. If that representation was made, it would be a false representation, I take it, based upon your judgment?

A. Yes.

Q. Who works as a liaison between your

\* \* \*

[p.33]

DONALD DUNAWAY

being present pursuant to the NOTICE and ORDER, having been first duly sworn on oath, testified as follows:

\* \* \*

[p.82] cent owner of AOSHPI, recognizing that at the time of initial incorporation it owned ninety-five percent?

A. I believe it was in late '68 or early '69.

Q. And since that time to the present, as I understand it, A.O. Smith has been a one hundred percent owner of AOSHPI?

A. That's correct.

Q. Now, that brings us back to a point in time where we left off with you at the retail installment credit -- or Time Credit Division.

A. Okay.

Q. How long did you serve in that capacity, sir?

A. From the time I joined Smith until Time Credit was sold and that was -- well, I hope I gave you the same dates --

Q. I'm not going to quibble over it.



A. '65 or '66.

Q. After you left -- after that division was sold what position did you fill?

A. General Credit Manager of Smith.

Q. And the function of General Credit Manager of Smith, at the time you were in that capacity, was what, sir?

A. Um--a staff relationship to Smith's divisions, attempting to assist them in the management of their accounts receivable and credit practices.

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF OLMSTED THIRD JUDICIAL DISTRICT

Raymond Kronebusch and  
Larry Kronebusch,

Plaintiffs,

ORDER AND MEMORANDUM

-vs-

MVBA Harvestore Systems;  
Minnesota Valley Breeders  
Co-op; A. O. Smith  
Harvestore Products, Inc.;  
A. O. Smith Corporation;  
and Jerry Papenfuss,

Defendants

Post-trial motions in this case were heard March  
29th, 1991. Appearances were:

CHARLES A. BIRD, Esq., of Bird &  
Jacobsen Law Office, 305 Ironwood Square,  
300 Third Avenue Southeast, Rochester,  
Minnesota 55906, appeared as co-counsel on  
behalf of Plaintiffs.

WILLIAM D. MAHLER, Esq., 301  
Ironwood Square, 300 Third Avenue  
Southeast, Rochester, Minnesota 55906,

appeared as co-counsel on behalf of Plaintiffs.

BLAKE SHEPARD, JR., Esq., of Leonard, Street & Deinard Law Office, Suite 2300, 150 South Fifth Street, Minneapolis, Minnesota 55402, appeared as co-counsel on behalf of Defendant A. O. Smith Harvestore Products, Inc. (AOSHPI).

CLAY TILLACK, Esq., of Katten, Muchin & Zavis Law Office, 525 West Monroe Street, Suite 1600, Chicago, Illinois 60606-3693, appeared as co-counsel on behalf of Defendant A. O. Smith Corporation (A. O. Smith).

Upon the memoranda and arguments of counsel, and all of the files and records herein,

IT IS ORDERED:

1. That defendants' motions for amended findings of fact and conclusions of law are denied;
2. That defendants' motion for judgment notwithstanding the jury's verdict is denied;
3. That defendants' alternative motion for new trial is denied;
4. That plaintiffs' motion for pre-judgment interest pursuant to M.S. 549.09 on \$1,200,000 from

commencement of this action to entry of judgment herein is granted;

5. That plaintiffs' are allowed their costs and disbursements herein;

6. That plaintiffs' motion for the allowance of attorney fees and investigation costs pursuant to M.S. 325.67 and M.S. 8.31 is granted, and this Court's order of May 9, 1988, to the extent it is inconsistent with this order, is vacated;

7. That entry of judgement herein shall be deferred an additional 30 days from the date of filing this order to allow plaintiffs time within which to notice hearing on the amount of allowable attorneys fees and investigation costs incurred herein.

A memorandum is attached and made a part of this Order.

Dated this 10th day of June, 1991.

BY THE COURT:

/s/ John S. Gowan  
Hon. John S. Gowan  
Judge of District Court

### MEMORANDUM

On February 15, 1991, a jury of this Court awarded Raymond and Larry Kronebush \$1,200,000 in damages against Defendant A. O. Smith Harvestore Products, Inc. (AOSHPI), and Defendant A. O. Smith Corporation (A.O. Smith). Punitive damages of \$1,250,000 were also assessed against each defendant.

The remaining defendants, Minnesota Valley Breeders Co-op and Jerry Papenfuss, paid plaintiffs \$75,000 after trial commenced in return for plaintiffs' agreement to withdraw their claims against them.

Upon the jury's special verdict, this Court entered Findings of Fact, Conclusions of Law, and Order for Judgment on February 19th, 1991, with the proviso that entry of judgment be stayed, as agreed by the parties, pending resolution of any post-trial motions.

Defendants have moved for amended findings of fact and conclusions of law; for judgment notwithstanding the verdict, or, in the alternative for a new trial. Plaintiffs have moved for pre-judgment interest, and allowance of costs, disbursement, and attorneys fees.

I. Defendants' motion for amended findings and conclusions of law:

Defendants seek set-off of \$75,000 paid by Minnesota Valley Breeders Co-op and Jerry Papenfuss for a release of plaintiffs' claim against them.

Fraud is an intentional tort, the evidence of which, on the part of defendants in this case, is overwhelming. A perpetrator of fraud is separately liable for the consequences of its conduct.

By their settlement plaintiffs made their judgment as to the degree of culpability for the harm done to them by those who paid them. For the co-op and Mr. Papenfuss, the \$75,000 may only be a measure of the amount they were willing to pay to avoid having a jury render judgment upon them.

Defendants should be in no position to benefit from this transaction. It may be said that to deny the set-off plaintiffs benefit in an amount greater than the damages assessed by the jury, but then, had the jury passed upon the conduct of the settling parties, who is to say that the total of the punitive damages would not have been greater. The compensatory damage award to plaintiffs would not have been affected by the presence of the settling defendants, but the parties, in their settlement, made no apportionment between punitive and compensatory damage. Can defendant now require that the total settlement be credited against compensatory damages? No case authority requires this, nor is there any principle to commend it, and therefore defendants' motion will be denied.

II. Defendants' motion for judgment notwithstanding the verdict:

The evidence in this case, taken as a whole, is sufficient to support the jury's findings as set forth in its special verdict.



Defendants refer to acknowledgments by plaintiffs in silo purchase orders (Exhibits 55-60) to the effect that they did not rely upon any representations by defendants in their decision to purchase any of the five silos involved in this litigation as a basis to defeat the jury's finding of reliance. But there was other evidence which supports the jury's finding, including the direct testimony of both Raymond and Larry Kronebusch that, indeed, they did rely upon defendants' representations in their decision to purchase each of the silos. It would not do for this Court to substitute its judgment for the jury on this issue when there is evidence which, if believed by the jury, would support a finding of reliance.

Defendants also cite their statute of limitations defense as to the 1968, 1972 and 1975 silo acquisitions as a basis for this motion. Defendants elicited admissions tending to establish knowledge on plaintiffs' part that its representations respecting the worthiness of its silos as a mechanism for preventing oxygen from coming into contact with stored feed were false and fraudulent. As the jury was instructed, fraud actions must be commenced within six years of discovery of the fraud. Plaintiffs' evidence was they consulted their Harvestore dealer as problems arose and undertook necessary repairs and followed their dealer's recommendations for modification of their use of the silos. Thus, a jury could infer that plaintiffs believed any problems were attributable to mechanical defects or improper usage that could be corrected.

In March 1985 Larry Kronebusch, while inside one of his silos which was undergoing repair, observed the presence of extensive mold covering surface areas which, as

he put it, caused him to suspect something seriously wrong with the silo. He consulted a lawyer and within two months of this discovery filed this lawsuit. From this evidence a jury could find that not until then--March of 1985--did plaintiffs discover evidence sufficient to place a reasonable farmer--one who is unsophisticated in causation factors involving engineering and structural design considerations--on notice of defects in the Harvestore system to the degree necessary to require him to commence legal action in order to preserve his remedies on the theory of fraudulent misrepresentation on the part of defendants.

For the foregoing reasons, defendants JNOV motion is denied.

### III. Defendants' motion, in the alternative, for a new trial:

This Court has reviewed the errors cited by defendants as grounds for a new trial and find them to be without merit. All fall within the ambit of Rules 59.01 (a) and (f) M.R.C.P. and refer to alleged errors in evidentiary rulings and instructions. These will be grouped and treated in the order set forth in defendant's motion.

#### Evidentiary issues:

5(a): The evidence referenced advertising relied upon by the plaintiffs in purchasing the 1972 (Exhibit 69) and 1975 (Exhibit 70) silos. The ads do contain performance representation of Harvestore silos relevance to the issues in the case, and it was for the jury to determine whether plaintiffs had relied upon them.

5(b): The film, "The Harvestore System," was admitted without objection as Exhibit 79. Defendants cite error in the admission of Exhibit 80, a transcript of the film. Defendant made no claim that the transcript was inaccurate. In the Court's view, the transcript was a helpful reference to that which the jury had already seen and heard on the film and would assist in evaluating the film content.

5(c): Harvestore Buyers Guides for 1973 and 1974 (Exhibits 98 & 99) were received by Raymond Kronebusch and were relevant to the issues of representations and reliance. It was for the jury to determine the weight they deserved.

5(d): Internal documents of defendants (Exhibits 115 & 119) were part of a collection introduced by plaintiffs (Exhibits 115-116, 118-120, 122-127, 129, 131, 134-135) tending to show knowledge of defendants of deficiencies in performance and design in the Harvestore System for storing feed. From these, a jury could infer defendants' knowledge spanned a period from 1940-1980 during which they made no significant design changes to accommodate the problems. All of these exhibits were clearly relevant to the case issues, and all were admitted without objection.

Exhibits 143 and 144 were admitted to aid the jury's understanding of comparative studies concerning the Harvestore and Madison silos introduced through the deposition evidence of William Smith, Jr. His testimony was relevant to case issues and the referenced exhibits in understanding his evidence.

Exhibit 145 is evidence of knowledge on the part of defendants of Harvestore deficiencies and was properly admitted for that purpose.

Exhibits 241 and 242 document studies at the Tuxen Farm in Alma, Wisconsin, conducted in 1981 in which AOSHPI personnel participated. These studies were relevant to the extent of defendants' knowledge respecting the factual claims for its product made over the years by defendants dating from the 1960's and from which the jury might infer that even in 1981 defendants still did not know how much air contacts feed within the Harvestore structures.

5(e) and 5(f): Prior litigation involving similar claims against defendants was relevant to show their knowledge of complaints extending over many years and involving farmers in different areas of the country in varying climates, and of defendants' response to these claims -- namely, no significant product design changes, and no significant change in product advertising claims. Indeed, factors to be considered by a jury in evaluating punitive damage claims include "the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the number and level of employees involved in causing or concealing the misconduct . . . ." M.S. 549.20, Subd. 3. In this respect, the testimony of William Johnson, who had extensive experience in the use of Harvestore silos, was particularly relevant, as was his testimony respecting his attempts to alert high officials of both defendants of the magnitude of the problems and the need to address them appropriately. So, too, was his evidence of the response he got from these



company officials. The admitted Exhibits 147, 177, and 168 were all relevant for the same reasons.

5(g): To the extent that the A.O. Smith corporate policy manual (Exhibit 174) afforded the jury a glimpse of its management objectives and practices, if was relevant and helpful in acquainting the jury with defendant and contributed to a frame of reference within which to understand the issues in the case.

5(h) and 5(I): The James Johnson testimony and his memorandum (Exhibit 178) was admitted to show the attitude of A.O. Smith policymakers toward product complaints and the objective of shielding knowledge of product deficiencies from the public, all relevant to issues of fraudulent misrepresentation and punitive damages. The exhibit was not subject to an attorney-client privilege because of its prior publication, and, in the context of the case as a whole, it was evidence of fraud not embraced by the privilege. Further, at the time the memorandum was sent James Johnson was corporate secretary, and, since it was sent to corporate employees, it was reflective of corporate policy and, thus, not privileged.

5(j): The reports and analyses (Exhibits 197-200) were admitted as documentation of Dr. Behr's damage theory to enable the jury to better understand and evaluate his opinions. His computations (Exhibit 247), intended as rebuttal to the factual basis for the opinions of defendants' economic expert, Dr. Dahl, was admitted for the same purpose.

5(k): Counsel for both parties utilized handwritten charts as a medium to establish or confirm proofs elicited from witnesses on both direct and cross-examination. Exhibit 180 is but one example of this. It is representative of many such charts which were admitted for both sides as an aid in the jury's understanding of the evidence. Exhibit 181 is but one example of charts brought to the courtroom by both sides which were admitted for the same purpose.

5(l): Evidence of the potential for an increase in milk production with adoption of the Harvestore system for feed storage was admitted to show product claims relevant to the misrepresentation and reliance issues. Dr. Behr's damage theory did not incorporate this evidence and was not submitted by plaintiffs as part of their damage proofs.

5(m): A.O. Smith reports (Exhibits 203-206) were admitted as evidence of admissions by defendant (Exhibits 203-205) of its product lines and market objectives in agriculture, and its relationship to A.O. Smith Harvestore Products, Inc. This evidence was relevant to the issues of control exercised by A.O. Smith over the operations of its subsidiary, and the degree of its participation in the marketing and sale of Harvestore products. Exhibit 206 was admitted to show the financial condition of A.O. Smith, evidence relevant to the issue of punitive damages.

5(n): Exhibits 207-208 were admitted to show the relationship between A.O. Smith Corporation and A.O. Smith Harvestore Products, Inc., given the identical nature of the content and structure of the ads, but with different logos. The evidence was relevant to the same issues discussed here with referent to 5(m) as to Exhibits 203-205.



5(o): The sales training manual (Exhibit 201) was admitted to show AOSHPI marketing objectives and sales techniques and its relationship and instruction to Harvestore dealers.

5(p): Defendants raised a question respecting whether certain feed tests had been done, and, if so, when. On rebuttal, plaintiffs offered a record of certain feed tests (Exhibits 245-246) to answer these questions, and the evidence was admitted for that purpose.

6(a): The complaint was excluded as an instrument for use in cross-examining Larry Kronebusch because to permit it would be unfair. The Rules of Civil Procedure permit his attorney to prepare it would be unfair. The Rules of Civil Procedure permit his attorney to prepare it and do not require that Kronebusch read or sign it before it is served. Whether a claimant adopts or rejects language of the complaint at any point in time could result in confusion and obfuscation of the issues and the evidence, and provoke embarrassment of a witness, the parties and their attorney, and bring the processes of the law into disrepute. The rules make only the attorney who prepares the instrument responsible for its content, not the plaintiff who was the witness here. The attorney cannot be required to testify as to its content before the jury hearing the case. If that is so, it would be incongruous to require plaintiff to explain its content. This is particularly true here since the complaint involved multiple parties and multiple theories of liability and damages, had been amended, has been the subject of multiple summary judgment motions which resulted in the dismissal of some claims, and, as to those remaining, save one, the rest were dropped. To require plaintiff to answer

for the content of his attorney's work product -- at that point -- would have been ludicrous. Better for the jury to decide the case on the evidence, leaving the pleading to frame the issues. For that reason, the evidence was excluded.

6(b): Dr. Paul Grafenburg was available as a witness to the parties, and his deposition testimony was excluded for that reason.

6(c): Deposition testimony of Jerry Dekan was scheduled and taken after the deadline for discovery established by order of this Court. It was excluded for that reason. Defendants were informed his testimony would be permitted upon his appearance as a witness. His post-trial affidavit, included in the record of these proceedings, discloses he would have been available as a witness had he been called to testify.

6(d): The testimony of Harlan Stehr was excluded upon defendants' showing of their intention to present the witness as a successful Harvestore farmer. The Court determined that the yield from such testimony, while having some probative value, would move the focus of the trial into issues far removed from those at hand, namely, was the witness indeed a successful Harvestore farmer, and, if so, to what was it attributable. Plaintiffs also disclosed the witness had refused, on the advice of his own separate counsel, to disclose financial information deemed pertinent to issues his testimony would raise. Further, through other witnesses and particularly Dr. Marx, defense counsel was permitted to offer a considerable body of evidence that Harvestore silos were in wide usage. Further, the Court rejected plaintiffs'

offer of evidence of prior verdicts in Harvestore cases for the same reasons adopted in excluding the Stehr evidence. Both forms of evidence had some probative value, but both would have introduced matters foreign to the jury's careful consideration of evidence in this case.

6(e): Exhibits 875 and 935-945 were excluded as being without foundation and otherwise hearsay.

6(f): Exhibit 894 was excluded as being without foundation and otherwise hearsay.

#### INSTRUCTIONS:

7(a): Instruction on concurring cause was given because an issue was raised as to whether more than one cause contributed to losses in plaintiffs' dairy farm operation.

7(b): Instruction on intentional torts was given to assist the jury in defining the term since it was an issue in the case.

7(c): The damages instruction was framed to account for theories of damages advanced by both parties in the case and yet embody existing law.

7(d): The indirect representations instruction was given to account for evidence of defendants' multifaceted marketing approach, embracing advertising in multiple mediums and third-party contact.

7(e): The agency instructions were given to account for evidence of the relationship between the parties defendant and the extent of any legal consequences flowing from such relationship.

7(f): The jury verdict form was drafted to reflect the necessary elements required for proof of plaintiffs' fraud claim, and to determine any liability for compensatory and punitive damages. It does this by breaking these elements into component parts with each to be addressed in the appropriate order so that the answer to one question would not forecast the answer to any other.

8(a): The statute of limitation instruction was crafted in plain language to provide a definitive answer to an issue in the case, given the jury instruction to which no objection was made.

8(b): Statements or salesmen from the Harvestore dealer were not singled out for specific instruction because the subject matter was covered by the agency instruction.

8(c): The subject matter concerning expressions of opinion and predictions regarding future events was covered by the instruction on fraud and misrepresentation.

8(d): The subject matter of fraudulent concealment was covered by the Court's instructions.

8(e)-8(i): The subject matter of damages was covered by the Court's instruction.

8(j): The subject matters of fraud and misrepresentation and statute of limitations were included in the special verdict form. Fraudulent concealment was not the subject of a separate claim and was not required for separate inclusion in the special verdict form. Nor were defendants entitled to separate findings in the special verdict form as to each silo. This case did not involve five separate lawsuits, or even separate claims concerning five silos. Instead, it involved a single claim against two defendants stemming from the use of Harvestore silos which allegedly caused damage to a dairy farming operation owned by plaintiffs. The verdict form was crafted to reflect findings necessary to establish or refute that claim.

9: The "material respects" in which the video tape system used in recording these proceedings were inadequate have not been defined by defendants, and thus this Court rejects this as a proper ground for assignment of error in these proceedings.

#### IV. Plaintiffs' motion for pre-judgment interest:

Plaintiffs rely upon M.S. 549.09. The reach of the statute is to both pre-verdict interest on pecuniary damages, and post-verdict interest until judgment is finally entered.

As to pre-verdict interest, the issue is whether there was a proper written settlement demand as contemplated by the statute. If not, pre-verdict interest would be calculated on pecuniary damages awarded to plaintiffs by the jury of \$1,200,000 from the commencement of this action to the date of the verdict.

Settlement history, as between the parties to this verdict, reveals that there were only two offers, one by each party. Plaintiffs offered to settle with Defendants AOSHPI and A. O. Smith in October of 1990 for a total of 2.1 Million Dollars. On December 6, 1990, AOSHPI responded with an offer of \$250,000 to plaintiffs in return for a settlement of all claims against defendants separately named, which included all of them except Jerry Papenfuss. On December 10, 1990, Jerry Papenfuss's attorney notified plaintiffs that defendants' offer was intended to include Jerry Papenfuss.

Given the pecuniary damage award of \$1,200,000, the margin from plaintiffs' offer is \$900,000, and the margin from defendants' offer is \$950,000, so, given the test under M.S. 549.09, plaintiffs' offer is closer to the verdict. It should follow that plaintiffs are entitled to pre-verdict interest at the statutory rate from the date of commencement of the action to February 15, 1991, the date of the verdict.

Defendants, however, assert that plaintiffs' offer was not valid because its terms did not include disposition of pending crossclaims between some of the defendants. In Hodder v. Goodyear Tire & Rubber Co., (Minn. 1988) 426 NW2d 826, 840, the Supreme Court observed that "the statute aims to promote settlements and this is best accomplished by offers which are straightforward and would in an effective and practical manner settle matters between the negotiating parties." This reasoning does not favor defendants' position.



In this case defendants' objection has little to commend it because plaintiffs were not in a position to control disposition of any crossclaims between the defendants at the time the offer was made. It was for defendants to decide whether acceptance or rejection of plaintiffs' offer was in their interests. Their exposure to any existing crossclaims would be one factor to consider in evaluating such an offer. By their offer plaintiffs meant to release defendants AOSHPI and A.O. Smith from any and all claims upon acceptance. This is all the statute requires to be a valid offer.

Accordingly, pre-verdict interest should be awarded to plaintiffs from the date of commencement of the action.

V. Plaintiffs' motion for the allowance of costs and disbursements:

This Court will order that costs and disbursements to be taxed and included in any judgment that is entered, but the amount thereof will have to await determination in accordance with the procedures established by Rule 54.04, M.R.C.P.

VI. Plaintiffs' motion for attorneys fees and investigation costs:

Plaintiffs seek attorneys fees under M.S. 8.31, Subd. 1, and M.S. 325F. 67. Plaintiffs also seek application of M.S. 325F.67 and 325F.69, but because this Court determines that plaintiffs' claims come within the purview of M.S. 325F.67, it is not necessary to reach their claims under M.S. 325F.68 and 325F.69.

M.S. 325F.67 applies to advertising claims of any sort offered to the public which contain untrue, deceptive, or misleading statements of fact. M.S. 8.31 confers upon private persons the right to collect attorneys fees and costs of investigation upon the successful prosecution of false claims under M.S. 325F.69.

Upon the special verdict of the jury in this case, this Court has found that defendants A.O. Smith Harvestore Products, Inc., and A.O. Smith Corporation made false representations of existing material facts respecting the design of the Harvestore System for animal feed storage with the intention of inducing plaintiffs to purchase and use five Harvestore silos in their dairy farming enterprise. The evidence in this case established that the medium for the false representations included advertising claims published in magazine, books, pamphlets, and film.

All necessary elements to prove a violation of M.S. 325F.67 were proved in establishing the fraud upon which plaintiffs' verdict in this case was founded.

Defendants both contend that plaintiffs may not recover under this statute because they are "commercial" parties whom the statute is not intended to protect.

It is not helpful to focus on the status of a party, be it "commercial" or "consumer" or some other characterization, in determining the effect to be given to the statute.

It seems more appropriate to focus on the evident purpose of the statute, which is to protect the public from

false advertising claims. Indeed, in State v. AAMCO Automatic Transmission, Inc., (Minn. 1972) 199 NW 2d 444, a case in which the court was asked to interpret the precursor to M.S. 325F.67, the fact that the parties involved were "commercial" in orientation did not enter into the court's analysis, despite the obvious opportunity to do so considering that two of the litigations were commercial enterprises. The issue is not whether the litigant is a "commercial" or "consumer" party, but whether there is a public interest in letting the litigant bring forward its action that in part arises from false or deceptive ads. This view is attractive because it protects both consumers and commercial businesses from false ads, and encourages both to act on behalf of the public interest.

M.S. 8.31 appears designed to encourage private litigants to pursue false advertising claims in order to benefit the public generally by providing for the recovery of the costs of the litigation in the event an action is prosecuted successfully. See discussion of its purpose in Liess v. Lindemyer, 354, NW2d 556 (Minn. App. 1984).

Should the application of M.S. 8.31 be limited to claims under M.S. 325F.67 in which the potential for recovery is small, against the possibility that claims would not be brought at all because of the expense involved and thus the public purpose advanced by the statute would not be served?

In Nociemba v. G.D. Searle, (D. Minn. 1988) 680 F. Sup. 1293, 1304, a federal district court observed that narrowing the application of the statute to small fraud claims could not be founded upon a reading of the statute.

A reason advanced for extending coverage of M.S. 8.31 is to encourage parties to act as "private attorneys general" and collect fees for their work in advancing the public interest. See Liess, Id. at page 558.

In considering whether these plaintiffs advanced the public interest by pursuing this claim, there was evidence in this case that in excess of 70,000 Harvestore silos had been sold over the years by defendants. This Court finds that, to the extent plaintiffs have alerted users, and potential users, of Harvestore products of false claims used by defendants in advertising their products, the public interest has been well served. Accordingly, attorney fees and litigation expenses will be allowed.

#### VII. Punitive Damages.

In furtherance of the objectives of M.S. 549.20, Subd. 5, this Court makes the following specific findings respecting the jury's award of punitive damages:

1. Punitive damages were a proper subject for jury consideration in this case.
2. The representations of defendants which the jury found to be false extended over a period of years dating to the 1960's.
3. Essentially these presentations were intended to persuade potential purchasers that the design of the Harvestore silo prevented oxygen from coming into contact with feed stored in it, thus eliminating any risk of feed

spoilage with its attendant economic loss to the feed itself and exposure to animals of the its deleterious effects.

4. Defendants knew these representations were false because of complaints and lawsuits dating back to the 1960's and because of internal staff reports spanning the 1950's through the 1980's. For example, an internal memorandum (Exhibit 134) dated October 25, 1954, noted the following:

"On several occasion Management and Research, and undoubtedly the Harvestore Division, have been embarrassed for lack of knowledge and engineering data concerning the Harvestore. We are manufacturing and selling the Harvestore as an air tight structure for the improved storage of silage and other materials and yet we have little or no information concerning the performance of the Harvestore or the service conditions that actually exist in the field."

And more than 26 years later, an internal report (Exhibit 135) states in its Recommendation, at page 6 therein:

"There are great information gaps in our knowledge of not only structure breathing but also the effect of other sources or oxygen in the performance of our product."

5. No evidence of this internal struggle to establish definition for its product and to accommodate its product design to better preserve stored feed is to be found in its claim for its product to the public. For example, its

film (Exhibit 79) extols the Harvestore System as the answer to the problem of spoilage in stored feed, asserting:

"It has long been realized that in order to preserve feed, air must be kept from it. To accomplish this, farmers have packed hay tightly into bales. They have packed wet silage into bunkers, stacks and concrete structures. A.O. Smith engineers were faced with this problem of the need for the Harvestore to breathe while at the same time keeping the air from contacting the stored feed. They solved the problem by introducing balloon-like bags into the top of the Harvestore . . ." (See film transcript Exhibit 80, page 1, lines 11-22);

and,

"The difference between conventional storage and a Harvestore is more like the difference between a Model T and a jet plane." (Id. at page 16, line 8-10).

6. Defendants knew of the limitations of the Harvestore silo in preventing oxygen from coming into contact with stored feed, and knew of the potential its product had to cause herd damage and diminish milk production in dairy enterprises, yet they persisted in an advertising and marketing campaign over many years stressing product virtues they knew were false, all the while shielding from the public the information which undermined these claims.

7. Defendants' attitude manifested a willful indifference to the rights of the farming public in general,



and these plaintiffs in particular, to have information necessary to make informed judgments respecting the decision whether to integrate the Harvestore silo into their farming enterprise.

8. The amount of punitive damages assessed by this jury are reasonable and reflective of the hazard to the public arising from defendants' misconduct, extending as it has over many years and affecting farmers across this country. The amount, given the financial condition of defendants, should have a deterrent effect upon defendants' future advertising and marketing activities to the end that the buying public is better informed of the limitations inherent in the Harvestore silo.

Dated: this 10th day of June, 1991.

BY THE COURT:

/s/ John S. Gowan  
Hon. John S. Gowan  
Judge of District Court

---

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

CIVIL DIVISION

TYPE OF CASE: PROPERTY DAMAGE

Court File no. 91-08583

MARVIN KLEHR and MARY KLEHR,

Plaintiffs,

VS.

A.O. SMITH HARVESTORE PRODUCTS,  
INC. A.O. SMITH CORPORATION MVBA  
HARVESTORE SYSTEMS, MINNESOTA  
VALLEY BREEDERS CO-OP, MID WEST  
BREEDERS CO-OP and 21st CENTURY  
GENETICS CO-OP,

Defendants.

AFFIDAVIT OF KAREN E. SPORS

---

Karen E. Spors, being duly sworn and under oath, states as follows:

1. I am an attorney employed by A. O. Smith Corporation as its senior counsel. In that capacity, I am familiar with, and have knowledge regarding, the litigation cited in this affidavit.

2. Attached hereto as Exhibit A is a true and correct copy of the jury's special verdict form in Albjerg vs. AOSHPI et al., State of Minnesota, Seventh Judicial District, Otter Tail County District Court, File No. 9-86-1015.

3. Attached hereto as Exhibit B is a true and correct copy of the special verdicts returned by the jury in Myers v. A. O. Smith Harvestore Products, Inc. et al., Payette County, Idaho, Case No. 8776 and the decision of the Court of Appeals of Idaho affirming the jury verdict cited as Myers v. A. O. Smith Harvestore Products, Inc. et al., 759 P.2d 695 (Id. App. 1988).

4. Attached hereto as Exhibit C is the trial court's Order and Judgment in Jordan v. A. O. Smith Harvestore Products, Inc. et al., File No. C82-244R (N.D. Ga. 1986), and an unpublished opinion from the 11th Circuit Court of Appeals affirming the jury verdict in favor of AOSHPI in that case.

5. Attached hereto as Exhibit D is the trial court's Opinion finding in favor of Defendant AOSHPI in Schmidlin v. A. O. Smith Harvestore Products, Inc., Civil File No. 83-1847-RE (D. Or. 1986); and Larson v. A. O. Smith Harvestore Products, Inc., Civil File No. 83-1848-RE (D. Or. 1986).

6. Attached hereto as Exhibit E is the trial court's Judgment and Order in favor of Defendants in Meuli vs. A. O. Smith Corporation et al., Case No. 84-1527-K (D. Kan. 1986, and Order and Judgment of the 10th Circuit Court of Appeals affirming the jury's verdict, cited as Meuli v. A. O. Smith, 865 F.2d 1150 (11th Cir. 1988).

7. Attached hereto is Exhibit F is a true and correct copy of the special verdict form in Dubbe v. A. O. Smith Harvestore Products, Inc. et al., State of Minnesota, First Judicial District, Scott County, File No. 84-06303, and Opinion of the Minnesota Court of Appeals cited as Dubbe v. AOSHPI et al., 399 N.W.2d 644 (Minn. at 1987).

8. In all of the cases cited above, the finder of fact returned a verdict or finding on issues of fraud in favor of AOSHPI and, where named as a Defendant, A. O. Smith Corporation. Punitive damages were not submitted to the jury in any of the above cases.

9. In the Minnesota cases of Albjerg, Dubbe, and Kapphahn v. A. O. Smith Harvestore Products, Inc. et al., First Judicial District, Carver County, Case File No. 85-20280, the trial court granted a directed verdict in favor of the Defendants before the case was submitted to the jury dismissing Plaintiffs' claims for punitive damages.

10. In addition to the cases cited above, I am aware of at least seven other cases against AOSHPI and/or A. O. Smith Corporation where punitive damages were not submitted to the jury, and at least four cases where punitive damages were submitted to the jury but where the jury returned a verdict

awarding no punitive damages against AOSHPI or A. O. Smith Corporation.

FURTHER YOUR AFFIANT SAYETH NOT

/s/ Karen E. Spors

Karen E. Spors

STATE OF MINNESOTA  
IN DISTRICT COURT  
COUNTY OF OTTER TAIL  
SEVENTH JUDICIAL DISTRICT

---

Jerry Albjerg,

Plaintiff,

-vs-

A.O. Smith Harvestore Products, Inc.

a Delaware corporation,

A.O. Smith Corporation, a New York

corporation, Valley Harvestore

Systems, a Minnesota cooperative,

Minnesota Valley Breeders Association,

a Minnesota cooperative d/b/a

Valley Harvestore Systems,

Defendants.

---

We, the jury in the above-entitled action for our Special Verdict answer the questions submitted as follows:

1. Did the Defendants make representations to the Plaintiff regarding the oxygen limiting capabilities of the Harvestore structure knowing that the representations were



false or stating them as true without knowing they were true or false with intent that the Plaintiff would rely on the representations which he reasonably did to his damage?

Yes \_\_\_\_\_ No X \_\_\_\_\_

2. If your answer to Question 1 is yes, were the representations a direct cause of the damage to the Plaintiff?

Yes \_\_\_\_\_ No \_\_\_\_\_

3. Did the Defendants breach any express warranty made by them concerning the features or use of the corn storage Harvestore structure?

Yes \_\_\_\_\_ No X \_\_\_\_\_

4. If your answer to Question 3 is yes, was the breach a direct cause of damages for the Plaintiff?

Yes \_\_\_\_\_ No \_\_\_\_\_

5. If you have answered Questions 1 and 2 yes, what sum of money, if any, would reasonably compensate the Plaintiff for the damage that he sustained as a result of the Defendants' false representation:

A) Forage Harvestore Structure \$ \_\_\_\_\_

B) Corn Storage Harvestore Structure \$ \_\_\_\_\_

C) Consequential damages: \_\_\_\_\_

	Prior to October 1981	Subsequent to October 1981
--	-----------------------------	-------------------------------------

i) Milk productions loss	\$ _____	\$ _____
ii) Additional supplements	\$ _____	\$ _____
iii) Purchase of additional equipment or fixtures	\$ _____	\$ _____
iv) Feed loss	\$ _____	\$ _____

6. If you have answered Questions 3 and 4 yes, what was the actual value of the corn storage Harvestore structure at the time that it was constructed on the Plaintiff's farm?

\$ \_\_\_\_\_

Dated: November 18, 1985 /s/ DeWayne A. Anderson  
Foreperson, if unanimous

IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - ONE

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is more probably true than not true.

1. Did defendant RMH make any of the following express warranties to plaintiffs which were breached:

ANSWER

- a. Increase in milk productions  
Yes \_\_\_\_\_ No X

- b. Not need protein supplements  
Yes \_\_\_\_\_ No X

- c. Less storage loss  
Yes \_\_\_\_\_ No X

- d. Harvestore structure was oxygen-limiting  
Yes \_\_\_\_\_ No X

If you answered any part of the above question "Yes", then please answer question 2. If you answered all of the above question "No", then sign the verdict form and go to the next verdict form and complete it. When you have completed all verdict forms, then inform the bailiff that you are done.

2. Did plaintiffs notify defendant RMH of any breach within a reasonable time after they discovered or should have discovered the breach?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered "No" to question 2, then you will not answer question 3, but will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 2, then answer question 3.

3. Was any breach a proximate cause of damages to the plaintiffs?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer is "No" to question 3, then you will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 3, then answer the questions in the Damages Verdict Form, and sign this form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

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IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,  
Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - TWO

---

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is more probably true than not true.

1. Did defendant AOSHPI make any of the following express warranties to plaintiffs which were breached: ANSWER

a. Increase in milk productions  
Yes \_\_\_\_\_ No X



- b. Not need protein supplements  
Yes \_\_\_\_\_ No X
- c. Less storage loss  
Yes \_\_\_\_\_ No X
- d. Harvestore structure was oxygen-limiting  
Yes \_\_\_\_\_ No X

If you answered any part of the above question "Yes", then please answer question 2. If you answered all of the above question "No", then sign the verdict form and go to the next verdict form and complete it. When you have completed all verdict forms, then inform the bailiff that you are done.

2. Did plaintiffs notify defendant AOSHPI of any breach within a reasonable time after they discovered or should have discovered the breach?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered "No" to question 2, then you will not answer question 3, but will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 2, then answer question 3.

3. Was any breach a proximate cause of damages to the plaintiffs?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

If your answer is "No" to question 3, then you will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 3, then answer the questions in the Damages Verdict Form, and sign this form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,  
Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

**SPECIAL VERDICT - THREE**

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is based upon clear and convincing evidence.

1. Have the plaintiffs proved that defendant AOSHPI made to plaintiffs a statement of past or existing fact that was false and material under all the circumstances; that when AOSHPI made the statement AOSHPI knew it was false or did not know it was true; and that AOSHPI

intended that the plaintiffs should act on the basis of the statement in about the manner in which they did act?

ANSWER: Yes \_\_\_\_\_ No X

If you answered the above question "Yes", then please answer Question 2. If you answered the above question "No", then sign the verdict form and go to the next verdict form and complete it. When you have completed all verdict forms, then inform the bailiff that you are done.

2. Have plaintiffs proved that they did not know the statement was false; that plaintiffs did rely on the truth of the statement in their subsequent agreement to purchase of the Harvestore products in question; and that plaintiffs acted reasonably under all the circumstances in relying upon the statement?

ANSWER: Yes \_\_\_\_\_ No X

If you answered "No" to question 2, then you will not answer question 3, but will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 2, then answer question 3.

3. Was plaintiffs' reliance on AOSHPI's fraudulent statement a proximate cause of damages to plaintiffs?

ANSWER: Yes \_\_\_\_\_ No X

If your answer is "No" to question 3, then you will sign this verdict form and go to the next verdict form. If you answered "Yes" to question 3, then answer the questions in the Damages Verdict Form, and sign this form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

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IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - FOUR

---

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is more probably true than not true.

1. Was Alan Myers engaged in a joint venture with his parents for the production of milk; and was the purchase of the Harvestore products made for the joint venture to use; and was Dale Myers acting as agent for the joint venture in receiving and acting upon any express warranties;



and could defendants reasonably expect both Dale and Alan Myers to act upon the express warranties?

ANSWER: Yes \_\_\_\_\_ No X

2. Was an express warranty made directly to Alan Myers, and could defendants reasonably expect Alan Myers to act on the express warranty?

a. As to RMH: Yes \_\_\_\_\_ No X

b. As to AOSHPI: Yes \_\_\_\_\_ No X

3. Was the written contract between Dale Myers and RMH intended primarily for the benefit of Alan Myers as an "original purchaser or user"?

Yes \_\_\_\_\_ No X

If you answer all of the above questions no, then sign this verdict form. If you answer any of the above questions yes, then sign this verdict form and answer the questions in the Damages Verdict form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

SPECIAL VERDICT - FIVE

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is based upon clear and convincing evidence.

1. Was Alan Myers engaged in a joint venture with his parents for the production of milk; and was the purchase of the Harvestore products made for the joint venture to use; and was Dale Myers acting as agent in receiving and acting on any alleged fraudulent statement from AOSHPI;

and could AOSHPI reasonably expect both Dale Myers and Alan Myers to act upon such statement?

Yes \_\_\_\_\_ No X \_\_\_\_\_

2. Was any alleged fraudulent statement from AOSHPI made directly to Alan Myers, and could AOSHPI reasonably expect Alan Myers to act upon such statement?

Yes \_\_\_\_\_ No X \_\_\_\_\_

If you answer all of the above question no, then sign this verdict form. If you answer any of the above questions yes, then sign this verdict form and answer the questions in the Damages Verdict form.

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)

---

IN THE DISTRICT COURT OF THE THIRD  
JUDICIAL DISTRICT OF THE STATE OF IDAHO,  
IN AND FOR THE COUNTY OF PAYETTE

Case No. 8776

DALE N. MYERS and ILA MYERS,  
husband and wife, and  
ALAN D. MYERS,

Plaintiffs,

vs.

A. O. SMITH HARVESTORE PRODUCT,  
INC., and ROCKY MOUNTAIN  
HARVESTORE, INC.,

Defendants.

DAMAGES SPECIAL VERDICT

We, the jury, answer the questions submitted to us in this special verdict as follows: In answering each question, at least nine (9) of us are persuaded, considering all of the evidence in the case, that our choice of answers is in accordance with the required burden of proof on damages.

4) You are now to determine the damages, if any, sustained by the plaintiffs.

a. difference at the time and place of acceptance between the value of the goods accepted and value they would have had if they had been as

warranted, unless special circumstances show proximate damages of a different amount.

\$\_\_NONE\_\_

- b. incidental damages, including any reasonably incurred expense incident to the breach.

\$\_\_NONE\_\_

- c. consequential damages resulting from defendant's breach.

\$\_\_NONE\_\_

The total amount of damages listed in a, b and c are:

\$\_\_NONE\_\_

5. You are now to determine what portion of the total damages sustained by the plaintiffs was proximately caused under each claim:

- a) RMH - warranty claim

\$\_\_NONE\_\_

- b) AOSHPI - warranty claim

\$\_\_NONE\_\_

- c) AOSHPI - fraud claim

\$\_\_NONE\_\_

DATED: April 11, 1986.

FOREMAN

(Signatures Omitted in Printing)



(Cite as: 114 Idaho 432, 757 P.2d 695)

Dale H. MYERS, and Ila Myers, husband and wife, and  
Alan D. Myers, Plaintiffs-  
Appellants,

v.

A.O. SMITH HARVESTORE PRODUCTS, INC.; A.O.  
Smith Corporation; and Rocky  
Mountain Harvestore, Inc., Defendants-Respondents,  
and  
Agristor Credit Corporation, Defendant.

No. 16599.

Court of Appeals of Idaho.

May 31, 1988.

Petition for Review Denied Sept. 14, 1988.

Buyers of feed storage and delivery system, who operated dairy farm, brought action against corporations that designed, manufactured, and sold the system. After grant of partial summary judgment to defendants on buyers' claims sounding in tort, and dismissal of variety of claims after presentation of plaintiffs' case, the District Court, Third Judicial District, Payette County, Wayne P. Fuller, J., entered judgment on jury's special verdict in defendants' favor, and buyers appealed. The Court of Appeals, Walters, C.J., held that: (1) defendants were not liable to buyers in negligence or strict liability as buyers' claim was for economic losses properly addressed as predicated upon contract claims rather than as tort claims; (2) written disclaimer was conspicuous and effectively excluded

implied warranties of merchantability and fitness for particular purpose; but (3) jury question was presented as to whether seller breached promise to provide expert and sound advice and assistance regarding operation of silo, and court should not have rejected that claim.

Affirmed in part; reversed in part; and remanded.

[1] PRODUCTS LIABILITY k17.1

313Ak17.1

Laws of negligence and strict liability impose no liability on manufacturer of product for defects which cause purely economic losses.

[2] PRODUCTS LIABILITY k17.1

313Ak17.1

Laws of negligence and strict liability impose no liability on seller of product for defects which cause purely economic losses.

[3] PRODUCTS LIABILITY k17.1

313Ak17.1

Designer, manufacturer, and seller of feed storage and delivery system were not liable to buyers of system who were operators of dairy farm for negligently advising buyers regarding operation of system and feeding of cattle, misrepresenting product, negligently designing and manufacturing product, or knowingly selling unreasonably dangerous product; economic losses suffered by buyers were properly addressed as contract claims rather than as tort claims.

[4] SALES k445(2)

343k445(2)

Whether disclaimer of implied warranties and acknowledgment by buyers was sufficiently conspicuous to effect waiver of implied warranties is question of law for court rather than factual question to be decided by jury. I.C. § 28-1-201(10).

[5] SALES k267

343k267

Written disclaimer of warranties with respect to feed storage and delivery system was conspicuous and effectively excluded implied warranties of merchantability and fitness for particular purpose; the statement was labeled as disclaimer in large, bold, capital letters and was written in bold, capital letters. I.C. § 28-1-201(10).

[6] SALES k267

343k267

Implied warranty claims were barred by disclaimer applicable to purchase of feed storage and delivery system, although buyers suggested seller's representative stated the side of the form containing parties' signatures did not relate to the purchase; the disclaimer was not part of the small print appearing on the signature page, and testimony did not suggest buyer was directed to ignore disclaimer, so there was no reason to refuse to enforce the disclaimer of warranties clause. I.C. § 28-1-201(10).

[7] APPEAL AND ERROR k1122(2)

30k1122(2)

Where only one conclusion can reasonably be drawn from evidence, question of fact may be decided by appellate court.

[8] PLEADING k48

302k48

Pleading requires only simple, concise and direct statement fairly apprising defendants of claims and grounds upon which the claims rest. Rules Civ.Proc., Rule 8(a)(1).

[9] APPEAL AND ERROR k766

30k766

Although substance of argument of appellant buyers of feed storage and delivery system, that jury should have been permitted to consider alleged breach of promise by seller to provide expert and sound advice and assistance regarding operation of silo, was not presented in opening brief, and seller accordingly did not have opportunity to respond directly in brief to a concise argument, the Court of Appeals would examine the substantive issue.

[10] TRIAL k165

388k165

Ordinarily, motion for dismissal in jury trial admits truth of adversary's evidence and every inference of fact which may be legitimately drawn therefrom. Rules Civ.Proc., Rule 41(b).

[11] APPEAL AND ERROR k1178(6)

30k1178(6)

Issue of whether seller of feed storage and delivery system failed to substantially perform alleged promise to provide expert and sound advice and assistance regarding operation of silo was for jury to decide, and court should not have rejected that claim; evidence permitted conclusion that alleged promise to provide advice and assistance had been made, court could not determine that the promise was satisfactorily

performed, and the case would thus be remanded for further proceedings to determine the issue.

[11] CONTRACTS k323(1)

95k323(1)

Issue of whether seller of feed storage and delivery system failed to substantially perform alleged promise to provide expert and sound advice and assistance regarding operation of silo was for jury to decide, and court should not have rejected that claim; evidence permitted conclusion that alleged promise to provide advice and assistance had been made, court could not determine that the promise was satisfactorily performed, and the case would thus be remanded for further proceedings to determine the issue.

[12] NEW TRIAL k22

275k22

Decision whether to grant new trial because of jury misconduct or irregularities in the proceedings rests in sound discretion of trial court. Rules Civ.Proc., Rule 59(a), pars. 1, 2.

[12] NEW TRIAL k44(1)

275k44(1)

Decision whether to grant new trial because of jury misconduct or irregularities in the proceedings rests in sound discretion of trial court. Rules Civ.Proc., Rule 59(a), pars. 1, 2.

[13] NEW TRIAL k143(5)

275k143(5)

Evidence of juror's statement, that several jurors declared immediately upon entering jury room that they had made up

their minds and that those jurors refused to participate in deliberations and played cards while remaining jurors deliberated, was inadmissible under evidence rule governing inquiry into validity of verdict or indictment, as no information was presented in affidavit suggesting that extraneous prejudicial information was improperly brought to jury's attention, outside influence was improperly brought to bear on any juror, or jury resorted to chance. Rules of Evid., Rule 606(b).

[14] NEW TRIAL k44(1)

275k44(1)

Even if evidence of juror's statement were admissible, information that several jurors declared immediately upon entering jury room that they had made up their minds and that those jurors refused to participate in deliberations and played cards while remaining jurors deliberated would not require new trial.

[15] CONSUMER PROTECTION k5

92Hk5

Idaho Consumer Protection Act is applicable to commercial transactions. I.C. §§ 48-601, 48-619.

[16] APPEAL AND ERROR k1067

30k1067

Any error in refusing to present claim under the Idaho Consumer Protection Act to jury in action by buyers of feed storage and delivery system against designer, manufacturer, and seller was harmless; jury was instructed regarding buyers' common-law fraud claims against designer and manufacturer, jury's responses to special verdict question included finding that designer and manufacturer did not falsely misrepresent



product to buyers, and buyers had presented no sound basis for jury to reach different result under the ICPA. I.C. §§ 48-601, 48-619; Rules Civ.Proc., Rule 61.

[16] APPEAL AND ERROR k1068(5)  
30k1068(5)

Any error in refusing to present claim under the Idaho Consumer Protection Act to jury in action by buyers of feed storage and delivery system against designer, manufacturer, and seller was harmless; jury was instructed regarding buyers' common-law fraud claims against designer and manufacturer, jury's responses to special verdict question included finding that designer and manufacturer did not falsely misrepresent product to buyers, and buyers had presented no sound basis for jury to reach different result under the ICPA. I.C. §§ 48-601, 48-619; Rules Civ.Proc., Rule 61.

[17] APPEAL AND ERROR k1067  
30k1067

Any error in rejecting instruction apprising jury of Idaho Product Liability Reform Act was harmless in action by buyers of feed storage and delivery system against designer, manufacturer, and seller of system; IPLRA itself created no new causes of action, but merely modified and clarified scope of existing product liability law, none of the modifications were particularly applicable to buyers' action, and of the theories listed in the proposed instruction, jury was instructed with respect to express warranties, and other claims were properly dismissed or otherwise disposed of before they reached jury. I.C. §§ 6-1401, 6-1410.

\*\*697 \*434 Larry C. Walker, Walker & Lindquist, Weiser, for plaintiffs- appellants.

Larry C. Hunter argued, and Douglas Martin Conde, Moffatt, Thomas, Barrett & Blanton, Boise, for defendants-respondents A.O. Smith Harvestore Products, Inc., and A.O. Smith Corp.

Theodore V. Wood, St. Clair, Hiller, Wood & St. Clair, Idaho Falls, for defendant-respondent Rocky Mountain Harvestore, Inc.

WALTERS, Chief Judge.

Dale and Ila Myers, operators of a dairy farm near New Plymouth, Idaho, purchased a feed storage and delivery system from Rocky Mountain Harvestore Products, Inc. (hereinafter Rocky Mountain). Alan Myers, their son, also fed his separately-owned cattle out of this unit. The system was designed and manufactured by A.O. Smith Harvestore Products, Inc., and A.O. Smith Corporation (collectively hereinafter A.O. Smith). Agristor Credit Corporation financed the purchase. [FN1] The Myers were dissatisfied with the system and sought help from Rocky Mountain. Eventually the Myers removed the system and brought this action against Rocky Mountain and A.O. Smith. The district court granted partial summary judgment to Rocky Mountain and A.O. Smith on the Myers' claims sounding in tort. Following a trial, the jury returned a special verdict in the defendants' favor. The court denied the Myers' subsequent motion for a new trial.

FN1. Early in this action the plaintiffs stipulated to dismissing Agristor and, hence, Agristor is not a party to this appeal.

The Myers contend the summary judgment was erroneous. They also challenge the court's decision to dismiss a variety of claims after presentation of the plaintiffs' case. They assert that their new trial motion should have been granted because of alleged jury misconduct. Five jurors allegedly announced an initial position at the outset of their deliberations and then refused to participate further in the deliberations. We reverse and remand as to one dismissed claim, an alleged promise by Rocky Mountain to provide expert assistance to the Myers, but affirm in all other respects.

The feed storage and delivery system consisted of a silo and a power-operated unloading unit, located in the bottom of the silo, for removal of the silo's contents. To preserve the nutritional value of the feed, the silo was designed to be oxygen-limiting. During an eighteen-month period after installation of the system, the Myers' combined dairy herd apparently suffered from decreased milk production. The Myers assert that the silo failed to function as promised, that Rocky Mountain failed to acknowledge or to successfully cure any defects, and, as a result, the Myers suffered significant losses. They theorize that the silo was unable to accommodate significant temperature fluctuations and permitted excess air exchange. Thus, the hay stored in the silo deteriorated and milk production declined. The Myers grounded their action on nine overlapping theories: (1) strict liability arising from affirmative misrepresentation; (2) common law deceit by misrepresentation; (3) common law deceit by intentional concealment of known defects; (4) breach of the written contract; (5) breach of express warranties; (6) breach of an implied warranty of merchantability; (7) breach of an implied warranty of fitness for a particular purpose; (8) strict liability arising from the sale of an unreasonably \*\*698 \*435

dangerous product; and (9) negligent design and manufacture of the product.

Prior to trial, the defendants moved for summary judgment. Concluding that only economic losses were being sought, the court dismissed the Myers' negligence and strict liability claims. After the plaintiffs' case had been presented to the jury, A.O. Smith moved to dismiss the breach of warranty claims, to dismiss all claims of Alan Myers, and to dismiss the fraud claims. Rocky Mountain requested that all claims against it be dismissed.

The court dismissed the claims which were based upon implied warranties and denied the motions with respect to express warranties. The court declined to dismiss the claim that A.O. Smith had misrepresented the oxygen-limiting nature of the system. However, concluding the evidence did not show that Rocky Mountain knowingly had made false statements, the court dismissed the fraud claim against Rocky Mountain. The other breach of contract claims were narrowed to the breach of a promise to properly install the system. The question whether Alan Myers stood in a relationship to the defendants which would permit recovery by Alan was retained for the jury. In sum, the only theories for recovery presented to the jury were those based on express warranties made by the defendants and the fraud claim against A.O. Smith. By special verdict, the jury found against the Myers on those claims.

On review, we have collated the issues raised by the Myers according to the various judicial acts challenged. We turn first to the district court's grant of partial summary judgment.



The Myers contend that employees of Rocky Mountain and A.O. Smith committed a variety of tortious acts including negligently advising the Myers regarding the operation of the system and the feeding of the cattle, misrepresenting the product, negligently designing and manufacturing the product, and knowingly selling an unreasonably dangerous product. The court granted summary judgment on these claims. The Myers contend that the court erred because these allegations presented questions of fact properly to be decided by a jury. For example, Dale Myers averred that employees of Rocky Mountain indicated that a dark color and strong odor were customary for feed stored in this type of silo and did not indicate reduced quality. The Myers offered evidence that these statements were erroneous.

The district judge concluded that the Myers were seeking to recover only economic losses arising from failure of the product to meet their expectation. Therefore, in the district court's opinion, the Myers could not prevail as a matter of law on their tort theories grounded in negligence and strict liability. The Myers contend that recovery in tort would be proper because the product caused property losses, namely damage to feed and to their cattle.

[1][2] Summary judgment is appropriate where a party is entitled to judgment as a matter of law after all facts and favorable inferences are drawn in the favor of the opposing party. See I.R.C.P. 56(c). The law of negligence and strict liability imposes no liability on the manufacturer of a product for defects which cause purely economic losses. *Tusch Enterprises v. Coffin*, 113 Idaho 37, 740 P.2d 1022 (1987);

*Clark v. International Harvester Co.*, 99 Idaho 326, 581 P.2d 784 (1978). Nor does it impose a liability on the seller under such circumstances. See *id.* Cf. 2 RESTATEMENT OF TORTS § 402 A (1963). Thus, resolution of this issue turns upon a characterization of the Myers' alleged loss.

[3] On facts similar to those in the case before us, a federal district court in Minnesota concluded "as a matter of law that the alleged damage to the alfalfa feed and the Holstein cows is non-recoverable economic loss." *Agristor Leasing v. Guggisberg*, 617 F.Supp. 902, 908 (D.Minn.1985). The court reasoned that "[t]he essence of [the Guggisberg] complaint is that the Harvestore [silo] failed to perform as expected, \*\*699 \*436 and they seek to recover the resulting losses to their dairy farm...." *Id.* The court was not persuaded that physical damage to stored feed and dairy cattle resulting from feed deterioration was outside the sphere of economic loss. Citing *Guggisberg*, the instant trial court viewed the alleged harm to the Myers' feed and dairy cattle as economic losses not recoverable in tort.

This conclusion is consistent with decisions reached by other courts which have considered the same question. See, e.g., *Agristor Leasing v. Spindler*, 656 F.Supp. 653 (D.S.D.1987) (spoilage of feed causing medical, reproductive and production problems with dairy cattle and lost profit not recoverable in tort); *Agristor Leasing v. Kramer*, 640 F.Supp. 187 (D.Minn.1986) (reaffirming holding of *Guggisberg*); *Agristor Leasing v. Meuli*, 634 F.Supp. 1208 (D.Kan.1986). But see *Agristor Credit Corp. v. Schmidlin*, 601 F.Supp. 1307, 1316 (D.Or.1985) (denying summary judgment because "[w]hether a strict tort liability claim is available depends on the type of defect, not the type of injury").



Our Supreme Court has stated:

Economic loss includes costs of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use.

*Salmon River Sportsman Camps, Inc. v. Cessna Aircraft Co.*, 97 Idaho 348, 351, 544 P.2d 306, 309 (1975).

The distinction [between tort and contract or warranty recovery] rests ... on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

*Seely v. White Motor Co.*, 63 Cal.2d 9, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965). See generally Note, Economic Loss In Products Liability Jurisprudence, 66 COLUM.L.REV. 917 (1966).

Each case must be examined on its particular facts and in light of the foundations of the rule. Here, the Myers did not plead any specific damages due to losses in feed or cattle value. The losses suffered as a result of feed deterioration and cattle illness were manifested by income changes brought on by reduced milk production.

Arguably, the Myers did allege property damage resulting from a defective product. However, these injuries did not result from a calamitous event or dangerous failure of the product. Rather, they arose from the failure of the product to match the buyers' commercial expectations. In sum, the Myers' claim is for lost profits and consequential business losses resulting from alleged failures of the silo. "When a loss results from mere product ineffectiveness, it is the law of contracts and commercial transactions, rather than strict products liability, which fixes responsibility for the loss." *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 223 (4th Cir.1982). Here these economic losses were properly addressed as predicated upon the contract claims, not in tort. *Clark v. International Harvester Co.*, supra. Therefore, we hold that the district judge properly dismissed the Myers' negligence and tortious strict liability claims.

## II

We turn next to the district court's decision to dismiss certain claims following presentation of the plaintiffs' evidence. Ruling from the bench, the district judge concluded that insufficient evidence had been presented for a jury to find a \*437 breach of an implied warranty and, further, that economic losses alone were not recoverable for \*\*700 breach of an implied warranty. [FN2] In addition, the court narrowed the breach of contract claim to a variety of oral promises and Rocky Mountain's written promise to properly install the system.

FN2. The court's latter conclusion of law is suspect. However, because our decision rests on the disclaimer

of any implied warranties, it is unnecessary for us to examine that particular ruling.

A

[4] We will first examine the implied warranties. A.O. Smith and Rocky Mountain support the district court's reasoning, and also assert that as a matter of law these warranties were disclaimed. Apparently the district court rejected the latter argument because the court believed the conspicuousness of the written disclaimer presented a factual question to be decided by a jury. However, that conclusion was erroneous. "Whether a term or clause is 'conspicuous' or not [for purposes of the Uniform Commercial Code] is for decision by the court." I.C. § 28-1-201(10). As explained below, our decision rests upon the disclaimer. Therefore, we do not reach the merits of the court's alternative reasoning.

The breadth of implied warranties is governed by the Uniform Commercial Code. See I.C. §§ 28-2-314, -315. Ordinarily, to be effective an implied warranty disclaimer must comply with I.C. § 28-2-316(2), which provides:

(2) Subject to subsection (3) [not applicable here], to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

"A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have

noticed it. A printed heading in capitals (as: NON-NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color." I.C. § 28-1-201(10).

[5] Here, the "order form" or purchase contract directed and required the buyer's signature not on the front of the form but on its reverse side. The side of the form upon which the signatures appear included the following bold heading and paragraph:

**SECOND DISCLAIMER**

**NO OTHER WARRANTY, EITHER EXPRESS OR IMPLIED AND INCLUDING A WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE HAS BEEN OR WILL BE MADE BY OR IN BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE EQUIPMENT AND ACCESSORIES OR THEIR INSTALLATION, USE, OPERATION, REPLACEMENT OR REPAIR. NEITHER THE MANUFACTURER NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF THIS WARRANTY, OR OTHERWISE, FOR ANY SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE (INCLUDING BUT NOT LIMITED TO THOSE RESULTING FROM THE CONDITION OR QUALITY OF ANY CROP OR MATERIAL STORED IN THE STRUCTURE) RESULTING FROM THE USE OR LOSS OF THE USE OF EQUIPMENT AND ACCESSORIES. THE MANUFACTURER MAKES NO WARRANTY WITH RESPECT TO THE ERECTION OR INSTALLATION OF THE EQUIPMENT, ACCESSORIES, OR RELATED**



EQUIPMENT BY THE HARVESTORE DEALER, WHO IS AN INDEPENDENT CONTRACTOR, OR BY ANY OTHER INDEPENDENT CONTRACTOR. IRRESPECTIVE OF ANY STATUTE, THE BUYER RECOGNIZES THAT THE EXPRESS WARRANTY SET FORTH ABOVE, IS THE EXCLUSIVE REMEDY TO WHICH HE IS ENTITLED AND HE WAIVES ALL \*\*701 \*438 OTHER REMEDIES, STATUTORY OR OTHERWISE.[ [FN3]]

FN3. No issue having been raised regarding the "irrespective of any statute" clause, we intimate no view regarding its validity.

Dale and Ila Myers signed this form and initialed an "ACKNOWLEDGMENT AND RELIANCE," to the effect: I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES, DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

Possibly because an exclusion may extend to a third party, see I.C. § 28-2-318 comment 1, Alan Myers has not contended that this disclaimer, if effective, is inoperative against him, a non-signing third-party.

As noted above, the question whether the disclaimer statement and acknowledgement was sufficiently conspicuous to effect a waiver is a question of law for the court. I.C. § 28-1-201(10); Glenn Dick Equipment Co. v. Galey Construction,

Inc., 97 Idaho 216, 541 P.2d 1184 (1975). The language quoted above is labelled as a disclaimer in large, bold, capital letters, and also is written in bold, capital letters. After examining the relevant exhibits, we hold that the written disclaimer was conspicuous and that the language effectively excluded implied warranties of merchantability and fitness for a particular purpose. Our holding is in accord with the conclusions reached by other courts which have examined nearly identical documents. E.g., Dubbe v. A.O. Smith Harvestore Products, Inc., 399 N.W.2d 644 (Minn.Ct.App.1987); Agristor Credit Corp. v. Schmidlin, 601 F.Supp. 1307 (D.Or.1985).

[6] Even if conspicuous, the Myers suggest the disclaimer clause should not be effective because a Rocky Mountain representative told Dale Myers that the side of the form containing the parties' signatures did not relate to his purchase. However, upon examining the referenced testimony we find a slightly different account of the execution of the document. On direct examination, Dale Myers testified:

Q: [T]here was [sic] some statements made by Mr. Collette concerning the back of this contract. What were those statements?

A: To the best of my recollection, Mr. Collette said that "That part of this contract has nothing to do with the equipment you're purchasing, the price of that equipment or anything of that nature. The back of this contract is the fine print, and you can read it." He handed me a pencil. I started to read it, and to me, it's small print, I did not read the whole thing. And he says, "When you get through, you can initial it here and sign it here."



That's what I done [sic].

[7] Where only one conclusion can reasonably be drawn from the evidence, a question of fact may be decided by an appellate court. See *Full Circle, Inc. v. Schelling*, 108 Idaho 634, 701 P.2d 254 (Ct. App. 1985). Here, the disclaimer was not part of the small print also appearing on the signature page. We find little in this testimony to suggest that Dale Myers was directed to ignore the disclaimer. On the contrary, he apparently was allowed to read it. Finding no reason to refuse to enforce the clause, we hold that the implied warranty claims were barred by the disclaimer.

#### B

Next we examine the trial court's decision to further limit the claim for breach of contract. Following presentation of the plaintiffs' evidence, the court granted a motion by the defendants to limit the breach of contract issue to oral warranties and to a claim that Rocky Mountain improperly installed the silo. The court subsequently \*439 \*\*702 rejected all jury instructions requested by the Myers describing non-warranty contractual duties and liabilities.

The Myers take issue with the court's rejection of their claim that Rocky Mountain failed to substantially perform a promise to provide expert and sound advice and assistance regarding three aspects of the operation of the silo-- feed rations, time-intervals for feeding use, and the addition of nutritional supplements to the hay in the silo. The Myers submit that the jury should have been permitted to consider the alleged breach of a promise to provide advice and assistance. In response Rocky Mountain presents four arguments: (1) no allegation of a failure to provide advice was included in the pleadings;

(2) the issue was not tried; (3) on appeal, the issue was raised belatedly in the Myers' reply brief, and (4) in any event, if such a promise was made, it was in fact performed. We will examine each response in turn.

[8] Modern pleading as reflected by I.R.C.P. 8(a)(1) requires only a simple concise and direct statement fairly apprising the defendants of claims and grounds upon which the claims rest. *Farrell v. Brown*, 111 Idaho 1027, 729 P.2d 1090 (Ct.App.1986). The Myers alleged that Rocky Mountain provided advice which did not cure all problems with the dairy herd, and stated a claim for breach of contract. After reviewing the Myers' complaint, we find the pleadings sufficient to raise this issue.

Nor can we say that the claim was not tried. The Myers presented testimony regarding nutrition advice provided by Rocky Mountain and expert testimony indicating the recommended rations were inappropriate.

[9] Although we must admit that the substance of the Myers' argument was not presented in their opening brief, the issue of breach of contract was listed and the supporting evidence was set forth. Unfortunately, the Myers concentrated their opening argument on their tort theories of negligent assistance and misrepresentation, rather than breach of a contract duty. Thus Rocky Mountain did not have an opportunity to respond directly in their brief to a concise argument. However, at oral argument, Rocky Mountain did address this issue and presented substantive rebuttal. Although we do not condone the Myers' delay, no prejudice is apparent and, therefore, we will examine the substantive issue.

[10] On motion of the defendants, the court would not permit the jury to consider the Myers' claim for breach of the promise to provide advice. The court's ruling was in effect a dismissal of that claim. Ordinarily, a motion for dismissal in a jury trial admits the truth of the adversary's evidence and every inference of fact which may be legitimately drawn therefrom. *Curtis v. Dewey*, 93 Idaho 847, 475 P.2d 808 (1970); see I.R.C.P. 41(b). Because the trial judge apparently believed express warranties to be the only contractual claims supported by the evidence, the judge also rejected many instructions sought by the Myers, relating to breach of contract.

[11] Our review of the record reveals that—viewing the evidence in the light most favorable to the Myers, as we must—the jury could reasonably have concluded that the alleged promise to provide advice and assistance had been made. We are unable to say that the promise was satisfactorily performed. That question of fact was substantially contested and, therefore, was properly for the jury to decide. Accordingly, we hold that the court erred by withholding this issue from the jury. We conclude that the case must be remanded for further proceedings to determine whether Rocky Mountain breached a duty to provide expert assistance to the Myers following installation of the silo and, if a breach occurred, whether compensable damages resulted.

### III

At the close of the trial, the jury returned a special verdict. The jury found that neither Rocky Mountain nor A.O. Smith had breached express warranties with respect to increased milk production, elimination of protein supplements, diminished feed storage loss, or the oxygen-limiting character

of the silo. The jury also \*\*703 \*440 found that A.O. Smith made no material, false representations. The jury rejected separate claims asserted by Alan Myers for recovery based upon theories of joint venture, contract, fraud and express warranty. Finally, the jury found that the Myers had sustained no direct damages in the form of decreased product value, nor any incidental or consequential damages, resulting from the equipment not being as warranted.

The Myers contend that this verdict is tainted and should have been set aside by the trial court on their motion for a new trial. They point to their counsel's affidavit recounting information indicating "several jurors" declared immediately upon entering the jury room that they had made up their minds. In their brief and at oral argument the Myers stated that this group of jurors totaled five in number. According to the affidavit, these jurors refused to participate in deliberations. Instead they allegedly played cards while the remaining jurors deliberated. Ultimately, ten of the twelve jurors concurred in the special verdict.

A.O. Smith and Rocky Mountain note that counsel's admittedly hearsay affidavit is the only evidence presented to show misconduct. See I.R.E. 606(b). They contend that this allegation, even if true, does not require setting aside the jury's verdict.

[12] A new trial may be granted because of jury misconduct or because of irregularities in the proceedings. I.R.C.P. 59(a)(1), (2). The decision whether to grant a new trial rests in the sound discretion of the trial court. *Quick v. Crane*, 111 Idaho 759, 727 P.2d 1187 (1986); *Clark v. Foster*, 87 Idaho



134, 391 P.2d 853 (1964). Idaho Rule of Evidence 606(b) provides:

Inquiry to validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes, but a juror may testify on the questions whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror and may be questioned about or may execute an affidavit on the issue of whether or not the jury determined any issue by resort to chance.

[13][14] No information was presented in the affidavit suggesting that extraneous prejudicial information was improperly brought to the jury's attention, that outside influence was improperly brought to bear on any juror, or that the jury resorted to chance. Accordingly, the evidence of a juror's statement contained in the affidavit was inadmissible. No other grounds for a new trial were presented. Therefore, the jury's verdict and the court's order denying the new trial motion are affirmed. [FN4]

FN4. Even if admissible, the information contained in the affidavit would not require a new trial. Apparently these jurors were simply quick to move to an unswerving position based on the evidence before

them. The Myers have not presented us with any authority holding that the type of behavior alleged here constitutes reversible misconduct. Although we do not condone such stubbornness on behalf of jurors when fulfilling their civic duty, we cannot say that, confronted with such behavior, a denial of a new trial would be an abuse of discretion.

#### IV

Finally we examine the Myers' contention that the trial court erred by rejecting jury instructions derived from two statutes: the Idaho Products Liability Reform Act, I.C. §§ 6-1401, -1410, and the Idaho Consumer Protection Act, I.C. §§ 48-601, -619.

#### A

[15] We turn first to the Idaho Consumer Protection Act (ICPA). The court dismissed this claim on two grounds: (1) the ICPA is not applicable to commercial transactions; and (2) failure to allege a violation \*\*704 \*441 of the ICPA. A.O. Smith contends that we should affirm on the second ground. We choose first to dispose of the court's theory that the ICPA is not applicable to commercial transactions.

Our statute does not expressly include or exclude commercial transactions. Compare Okla.Stat. tit. 15, § 752(B) (1981) ("Consumer transaction" means the advertising, offering for sale, sale, or distribution of any services or any property, tangible or intangible, real, personal or mixed, or any other article, commodity, or thing of value wherever situated, for purposes that are personal, household or business oriented.).



When construing the ICPA we are instructed to give "due consideration and great weight" to interpretations by the federal trade commission and the federal courts of § 5(a)(1) of the Federal Trade Commission Act. I.C. § 48-604(1). Our research has revealed no federal cases suggesting that the comparable federal act is not intended to protect the ultimate consumer of a product merely because that consumer intends to use the product in a for-profit business. After a review of the ICPA, the regulations promulgated by the attorney general pursuant to I.C. § 48-604(2), and the published decisions relating to the ICPA, we find little to support the court's conclusion. Both the statute and the regulation include the same broad, all-inclusive definition of goods as "any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, including certificates or coupons exchangeable for such goods." See I.C. § 48-602(6) and IDAPA 04.01.2,8. Finding no authority to the contrary, we hold that the ICPA is applicable to this type of transaction.

[16] Here, although the jury was not instructed under the ICPA, it was instructed regarding the Myers' common law fraud claims against A.O. Smith. Their responses to the special verdict question included a finding that A.O. Smith did not falsely misrepresent its product to the Myers. The Myers suggest that the knowledge that such misconduct was statutorily condemned, as well as being a common law misdeed, might have swayed the jury. We do not find this argument persuasive. Juries are presumed to render good, conscientious decisions whether the law is established by the courts or by the legislature. The Myers have presented no sound basis for a jury to reach a different result under the ICPA. We hold that the court's refusal to present a claim

under ICPA to the jury, even if error, constituted harmless error. [FN5] See I.R.C.P. 61.

FN5. Because we deem the error in this case to be harmless, we reserve for another day the question whether the ICPA must be specifically pled.

## B

[17] The Myers also contend the jury should have been apprised of the Idaho Product Liability Reform Act (IPLRA). The only proposed jury instruction which had particular reference to the IPLRA read:

The Myers additionally claim that the Defendants are liable or responsible to them under Idaho's Product Liability Reform Act. That Act provides four theories or rights of recovery: strict responsibility for a product breach of express warranty or promise; breach of an implied promise of a product's merchantability; and breach of an implied promise of a product's fitness for a particular purpose. The Myers claim that the Defendants are responsible to them under each of these rights of recovery.

This instruction, which was rejected by the court, contained no recovery theory not addressed elsewhere in the Myers' pleadings. The IPLRA itself creates no new causes of action; it merely modifies and clarifies the scope of existing product liability law. I.C. § 6-1401. None of these modifications was particularly applicable to this action.

Of those theories listed in the proposed instruction, the jury was instructed with respect to express warranties. We have held that the other claims were properly dismissed or

otherwise disposed of before \*\*705 \*442 they reached the jury. Error in denying an instruction may be harmless if the instruction was otherwise covered or if no prejudice resulted. See *Carpenter v. Double R Cattle Co.*, 108 Idaho 602, 701 P.2d 222 (1985); *Basye v. Hayes*, 58 Idaho 569, 76 P.2d 435 (1938). It is clear that this instruction would not have aided the jury in its task. Accordingly, we hold that any error in rejecting this instruction was harmless.

### CONCLUSION

As set forth above, we hold that the district court erred by dismissing the Myers' claim that Rocky Mountain may have breached a contractual promise to provide expert advice and assistance following installation of the silo. Therefore, the case is remanded for further proceedings consistent with that holding. In all other respects, the judgment of the court and the order denying a new trial are affirmed. Costs to appellants; no fees allowed.

BURNETT and SWANSTROM, JJ., concur.

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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

GEORGE SCHMIDLIN and  
ENGLA SCHMIDLIN,

Plaintiffs, Civil No. 83-1847-RE

v.

A. O. SMITH HARVESTORE  
PRODUCTS, INC.,

Defendant.

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ROBERT M. LARSON and  
LORETTA LARSON,

Plaintiffs. Civil No. 83-1848-RE

v.

A. O. SMITH HARVESTORE  
PRODUCTS, INC.,

Defendant.

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### OPINION

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REDDEN, Judge:

Plaintiffs sue alleging common law fraud and fraud by concealment. Trial was to the court. I find for the defendant.

This case has a long and complicated procedural history. It is not necessary to recount it here. Suffice it to say that these party plaintiffs sued A. O. Smith Harvestore Products, Inc. (AOSHPI), claiming that they were defrauded and induced to purchase grain storage units which are large,

cylindrical structures designed to store grain and forage used to feed livestock (silos). These plaintiffs had many additional claims against this and other defendants. Some of their claims were dismissed in earlier litigation and other claims, against other defendants, have been settled.

The thrust of the lawsuit is plaintiffs' contention that they were induced to purchase the silos through misrepresentation by the defendant. Generally, plaintiffs claim that the silos were advertised and sold as "oxygen free" or "oxygen limiting" when they were so constructed that they actually inducted oxygen into the silo and into contact with the contents. Defendant argues that its sales pitch claimed only that the silos were oxygen limiting and not oxygen free. Defendant contends that the silos are in fact oxygen limiting and that by reason of that fact the silos result in better quality feed combined with a lesser expenditure of time by the farmer-purchaser. Both plaintiff-families were experienced dairy farmers when they acquired and used the silos.

The Schmidlins bought a 20 foot by 77 foot silo in June of 1952 from a local dealer. It was intended for the storage of haylage, or medium moisture forage, for use in the Schmidlins' dairy.

The Larsons acquired two Harvestore structures, one 20 feet by 87 feet in 1980 and one 20 feet by 59 feet in 1981. These were acquired to store haylage and grain, respectively. The grain structure was primarily adapted for high moisture corn.

The silos were unique in that they were cylindrical, vertical feed storage tanks erected on concrete foundations,



made from numerous glass-coated steel plates bolted together and sealed so as to provide a permanent sealed storage. Further, each silo contained so-called "breather bags" installed inside said tanks which were intended to equalize inside and outside gas pressures. Each silo had a mechanical bottom loading device which is intended to unload from the bottom of the storage tank which is loaded from the top. Another unique feature was a top mounted gas pressure relief valve. It is advertised and designed to allow simultaneous loading (top) and feeding (bottom).

As stated, the plaintiffs here allege fraud and must prove their case by clear and convincing evidence. Oregon law controls here. The parties are in accord that the necessary elements of fraud, which plaintiffs must prove, are as set forth in plaintiffs' trial memorandum: 1) a representation; 2) its falsity; 3) its materiality; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) his intent that it should be acted on; 6) the listener's reliance on its truth; 7) his consequent and proximate injury. Gardner v. Meiling, 280 Or. 665, 671, 572 P.2d 1012 (1977); U.S. National Bank v. Fought, 291 Or. 201, 220-221, 630 P.2d 337 (1981); Briscoe v. Pittman, 268 Or. 604, 610, 522 P.2d 536 (1974); Rice v. McAlister, 268 Or. 125, 128, 519 P.2d 1263 (1974); State ex rel Redden v. Discount Fabrics, 289 Or. 375, 384-385, 615 P.2d 1034 (1980).

Although plaintiffs assert that the fraud here is as described by Lord Blackburn<sup>1</sup> their fallback position is under

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<sup>1</sup> "... downright fraud; in plain English, and Scotch, also, it is a downright lie told to induce the other party to act upon it." Brownlie v. Campbell, L.R. S.A.C. 925

the fraud by concealment theory, and plaintiffs say, specifically, fraud by nondisclosure. Plaintiffs' trial memorandum, page 7. The necessary elements of proof for the plaintiffs are set forth in U.S. National Bank v. Fought, *supra*. Plaintiffs accurately quote those elements from Restatement (Second) of Torts § 551 (1977) at page 7 of their trial memorandum;

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous

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(1880). Plaintiffs' trial memorandum, page 2.

representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

The parties waived a jury and this case was tried to the court. I enter judgment for defendants for the reasons I will now set forth.

The plaintiffs' claim made through their own testimony and introduction of various exhibits, is that the defendant falsely represented that the silos were designed to limit the oxygen whereas they actually inducted it during the normal and recommended manner of operation. Plaintiffs claim that they relied upon the defendant's representations regarding the oxygen limiting operation. Plaintiffs, at times during their testimony, seemed to argue a theory that the product was sold as one which would completely eliminate oxygen "seepage" into the silo at contact with its contents. The plaintiffs, however, admitted that they knew some oxygen, of necessity, would contact some portions of the contents of the silos. This would necessarily occur both during loading and unloading. I find that the representation was that the silo was "oxygen

limiting" as opposed to "oxygen free" and find further that the silos were in fact oxygen limiting as represented.

Plaintiffs fail to prove, by clear and convincing evidence, that a false representation was here made. The representation was material, if not false. I find that the defendant believed the representation it made and that it did intend that plaintiffs also believe the representation and act thereon.

Plaintiffs did not prove, by clear and convincing evidence, that they relied upon the representation. Both plaintiffs conducted their own independent investigation of the product and the claims made thereto prior to their respective acquisitions. Both were experienced dairy farmers with good common sense who did not acquire with a belief that the silos were oxygen free.

Much of the evidence went to the point that defendant was aware the product was not perfect and that oxygen was allowed to enter. Specifically, plaintiffs showed that defendant had considered and rejected various additional and expensive devices which would, or could, have further limited oxygen contact. The defendant admittedly was, and presumably is, attempting to improve the product. The various methods and devices considered and explained at trial would have rendered the end product so expensive as to be impractical. Defendant's continuing research is not proof of a defective product and, more to the point, is not clearly convincing evidence of fraudulent conduct or representations.

The plaintiffs failed, in particular, to sustain their burden of proof that the silos "not only did not limit oxygen



but actually induced oxygen into the system and rotted the feed." For the reasons stated above I find that plaintiffs failed to prove these charges. Plaintiffs also contend under their concealment theory that defendant should have told them that the silos induced oxygen into the structure and throughout the ensiled feed during normal operation and use, resulting in a substantial deterioration in the nutrient content of the feed. They further contend that defendant should have advised them that the alleged oxygen induction had resulted in numerous claims and lawsuits across the country. They also contend that the oxygen induction problem had resulted in defendant withdrawing the silos from sale in the State of California. They then contend that had they been made aware of the above material facts, they would not have acquired the silos.

The evidence, as noted, disclosed that the silos did not induce oxygen into the structure within the meaning and use of that phrase by these plaintiffs.

It is true that lawsuits had been filed and that plaintiffs were not made aware of them. It is not clear how many of the lawsuits had been filed prior to plaintiffs' acquisition and whether knowledge of such lawsuits would have been material. I find that plaintiffs have not proved that the information would have been material or that they would have acted upon it and rejected the purchase of the silos. Plaintiffs have not proved that defendant had a duty to disclose existing litigation involving the product in a situation where plaintiffs had and exercised the opportunity to conduct an independent and detailed investigation into the operation of the product to determine whether it functioned as represented. Here, plaintiffs investigated the product thoroughly prior to

purchase, and one of them actually purchased a second unit after apparent satisfaction with the operation of the first unit purchased.

The plaintiffs proved no facts which would entitle them to recover for failing to disclose existing litigation under Section 551(2) of the Restatement, *supra*. As a matter of fact, in their trial memorandum plaintiffs do not contend they should recover under the concealment theory for alleged failure to advise of existing litigation. Plaintiffs urge recovery there under the theory that failure to advise plaintiffs that "the system not only failed to perform in the manner advertised but caused the feed to rot and, as a consequence, reduced the milk production of the cattle and caused the death of offspring." I have earlier indicated my findings on these issues which are contrary to plaintiffs' assertions.

The record in this case also revealed that the silos had been used and studied by large numbers of independent scientists and engineers as well as universities and found to have met with success. Further, numerous articles, studies and reports have been authored which supported the effectiveness of the silo structure. The defendant was entitled to rely on those documents and records. It was proved at trial that in the United States and Canada there are over 41,000 owners of some 74,000 such silos and that half of multiple unit owners acquired their second unit more than one year after acquiring the first. Such data, favorable to defendant, would reasonably have convinced it to represent its product as it did. Finally, I should point out that plaintiffs' approach to the concealment theory "is raised out of an overly developed and lawyerly sense of caution and it should be redundant given the fraud which occurred." Plaintiffs' trial memorandum, page 9.



The crux of plaintiffs' case is needed proof that the units acquired inducted, rather than limited, oxygen intake and, as a result, spoiled the stored contents. This they failed to prove.

Evidence demonstrated that many of the problems encountered by plaintiffs were the result of the manner in which they operated their dairy and that some of the problems were caused by others not a party to this litigation. In summary, I find that plaintiffs have failed to sustain their burden of proof that they were defrauded and that defendant prevails. Judgment shall enter accordingly.

This Opinion shall serve in lieu of my findings of fact and conclusions of law.

Dated this 24 day of October, 1986.

/s/ James A. Redden

James A. Redden  
United States District Judge

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**United States District Court**

**District of Kansas**

GENE E. MEULI and ROSE MARIE MEULI

v.

A. O. SMITH CORPORATION, INC.;  
A. O. SMITH HARVESTORE PRODUCTS, INC.;  
MID-AMERICAN HARVESTORE, INC., and  
ROBERT GATTSHALL

CASE NUMBER: 84-1527-K

**JUDGMENT IN A CIVIL CASE**

- X   Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- X   Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Memorandum and Order filed April 29, 1986, and entered on the docket April 30, 1986, the motion for summary judgment of defendant A. O. Smith Corporation, is granted.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with the Order filed and entered on the docket

September 30, 1986, the motions for directed verdict of defendants Mid-America Harvestore, Inc., and Robert Gattshall are granted.

IT IS FURTHER ORDERED AND ADJUDGED that in accordance with the verdict returned by the jury September 30, 1986, plaintiffs Gene E. Meuli and Rose Marie Meuli take nothing, that the action be dismissed, and the defendant A. O. Smith Harvestore Products, Inc., recover of plaintiffs their costs of action.

APPROVED:

/s/ Patrick F. Kelly  
PATRICK F. KELLY

October 1, 1985  
Date

/s/ Ralph L. DeLoach  
Clerk

/s/ Ruth Thompson  
(By) Deputy Clerk  
Ruth Thompson

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(Cite as: 865 F.2d 1150)

AGRISTOR LEASING, Plaintiff,

v.

Gene E. MEULI and Rose Marie Meuli, Defendants, Third-Party-Plaintiffs,  
Appellants,

v.

A.O. SMITH HARVESTORE PRODUCTS, INC. and  
Mid-America Harvestore, Inc., Third-Party-Defendants, Appellees.

No. 86-2775.

United States Court of Appeals,  
Tenth Circuit.

Dec. 7, 1988.

Lessor brought action against farmers for breach of silo lease, and farmers counterclaimed and filed third-party action against silo manufacturer and silo distributor for breach of implied warranty of merchantability and fraud. The United States District Court for the District of Kansas, Patrick F. Kelly, J., dismissed distributor and returned verdict in favor of manufacturer, and farmers appealed. The Court of Appeals, Seth, Circuit Judge, held that excluding evidence pertaining to litigation over performance and marketing of manufacturer's silos in California over 20 years earlier was not abuse of discretion.

Affirmed.



See also, D.C., 634 F.Supp. 1208.

[1] FEDERAL CIVIL PROCEDURE k2011  
170Ak2011

Excluding evidence pertaining to litigation over performance and marketing of manufacturer's silos in California over 20 years earlier was not abuse of discretion in farmers' action against manufacturer for fraud and breach of implied warranty of merchantability; time differential, design changes and different climatic conditions created danger of unfair prejudice and danger of confusing issues. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE k2653  
170Ak2653

Even if trial court abused its discretion in excluding evidence concerning litigation over performance and marketing of manufacturer's silo in California over 20 years earlier to support farmers' fraud claim against silo manufacturer, error did not prejudicially affect farmers' substantial rights and could not form basis for setting aside verdict in favor of manufacturer; farmers were able to introduce evidence on each of issues raised by excluded evidence, and trial court preserved farmers' right to use evidence on cross-examination for rebuttal purposes. Fed.Rules Civ.Proc.Rule 61, 28 U.S.C.A.; Fed.Rules Evid.Rule 103(a), 28 U.S.C.A.

[3] FEDERAL COURTS k623  
170Bk623

Farmers' failure to object to dismissal of silo distributor on breach of warranty and fraud claims precluded consideration on appeal of whether dismissal was proper.

\*1150 Brock R. Snyder and Brian Frost, Topeka, Kan., for defendants, third-party plaintiffs, appellants.

Monte Vines and Clifford L. Malone of Adams, Jones, Robinson and Malone, Chartered, Wichita, Kan., for third-party-defendant, appellee A.O. Smith Harvestore Products, Inc.

William Hergenreter of Shaw, Hergenreter & Quarnstrom, Topeka, Kan., for third-party-defendant, appellee Mid-America Harvestore, Inc.

Before McKAY, SETH and ANDERSON, Circuit Judges.

SETH, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed.R.App.P. 34(a); Tenth Cir.R. 34.1.8. The cause is therefore ordered submitted without oral argument.

This appeal in a diversity action (a third-party action) arises from the lease of a "Harvestore" silo by Gene and Rose Marie Meuli (the Meulis). The silo was manufactured \*1151 by A.O. Smith Harvestore Products, Inc. (AOSHPI) and distributed through dealerships. The Meulis were approached about buying a Harvestore by Mid-America Harvestore, Inc. (Mid-America), the product's distributor for the area where the Meulis lived. After an extensive sales pitch by Mid-America's salesman, Robert Gattshall, the Meulis agreed to acquire a silo. Rather than buying it directly from Mid-America, they decided to enter into a lease agreement with

AgriStor Leasing. AgriStor purchased the structure from Mid-America and leased it to the Meulis.

After making their initial lease payments, the Meulis did not make the subsequent lease payments. AgriStor filed suit to repossess the silo, and for money damages under the lease. The Meulis counterclaimed and filed this third-party action against AOSHPI, AOSHPI's parent corporation, A.O. Smith Corp., Mid-America and Robert Gattshall, claiming that the silo's implied warranty of merchantability had been breached and that they had been induced to enter into the lease agreement through the use of fraudulent misrepresentations.

A.O. Smith Corp. and AgriStor were dismissed from the suit prior to trial. The case went to trial on the Meulis' claims of fraud and breach of the implied warranty of merchantability. Mid-America and Gattshall were dismissed at the close of the Meulis' case. The jury returned a verdict in favor of the remaining defendant, AOSHPI.

The Meulis raise two issues on appeal. First, they claim that the trial court abused its discretion under Fed.R.Evid. 403 by excluding evidence pertaining to litigation over the performance and marketing of the Harvestore silo in California in the 1960's. Second, they claim that the trial court's dismissal of Mid-America was erroneous under Fed.R.Civ.Proc. 41(b) and 52(a) since the trial court failed to offer any reason for the dismissal. Each of these issues will be considered after a brief review of the facts.

In its marketing the company describes several features that it urges make its product superior to conventional silos. The witnesses' testimony was directed to these features. The

Harvestore silo was characterized as an "oxygen-limiting" or "sealed" silo. Unlike conventional silos, which are open to fresh air, the walls, floor and roof of the Harvestore silo are airtight. This feature theoretically allows for less spoilage or loss of feed, and the feed should retain a higher percentage of nutrients. Silage acids can attack conventional structures made of concrete, galvanized steel or other materials. In theory, this deterioration will not occur in a Harvestore silo since it is made of heavy steel sheets that have a protective layer of glass fused into their surfaces. This forms a shield that repels silage acids and stands up to weathering. The impermeable construction of the silo thus enhances its "oxygen-limiting" capability. There were other claimed advantages from the silo's design.

The Meulis were told by Robert Gattshall, the salesman, that the added expense of the Harvestore silo would be offset by the savings that would accrue to their farming operation from the use of the silo. He estimated that the amount of money saved by the Meulis on protein supplement would more than cover the amount of their monthly rental payment. It was on the basis of these representations that the Meulis entered into the lease agreement for their Harvestore.

At trial, the Meulis claimed that the Harvestore did not produce the increase in feed quality that had been promised to them. Instead, they claimed the Harvestore silo's design was so flawed that the alfalfa stored within the structure actually experienced more exposure to oxygen than it would have in a more conventional silo. Their witnesses testified as to the design flaws, and that the oxygen which entered the silo caused more deterioration of the contents than for an ordinary silo.



The Meulis thus claimed that this influx of oxygen led to the deterioration of the alfalfa, which in turn reduced its nutritional value and led to reductions in the amount of weight gained by the Meulis' cattle. These allegations formed the basis \*1152 of the Meulis' claim that the Harvestore silo was unmerchantable.

The Meulis also claimed that they were induced into leasing the silo through fraudulent misrepresentations made on behalf of the product. The Meulis claimed that AOSHPI represented the silo to them as "oxygen-limiting" when it had known for years that the structural defects of the silo were allowing a significant amount of oxygen to come into contact with the feed stored inside. At trial, the Meulis sought to present evidence of the poor performance of the Harvestore silos in California in the early to mid-1960s by a witness who had owned Harvestore structures in California in the late 1950s and early 1960s and later became a Harvestore dealer there. As a dealer, the witness was involved in customer relations and had the opportunity to speak with many Harvestore customers throughout the state. In an in limine hearing the Meulis represented that the witness would testify as to design defects in the silo and failures in its performance in California in the early and mid-1960s. They also stated at the hearing that the witness would testify that he informed AOSHPI of these problems, that AOSHPI ignored his warnings, and that ultimately he was forced to join with many Harvestore customers in litigation against the company. The litigation resulted in a substantial settlement for the witness and settlements and verdicts for other plaintiffs.

[1] On the motion of AOSHPI, the trial court excluded the California evidence under Fed.R.Evid. 403, citing the dangers

of unfair prejudice and confusion of the issues. It is this ruling by the trial court that the Meulis challenge on appeal. They claim that this ruling affected their substantial right to prove their case since this evidence was essential to overcome the clear and convincing standard of proof they had to meet on their fraud claim as well as to overcome the aura of legitimacy and reliability surrounding a large company like AOSHPI.

This court has evinced a strong reluctance to upset a trial court's ruling on the admissibility of evidence under Fed.R.Evid. 403. "Challenges under Rule 403 call for balancing the probative value of and need for the evidence against the harm likely to result from its admission." *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1257 (10th Cir.). This balancing task "is one for which the trial judge, because of his familiarity with the full array of evidence in the case, is particularly suited." *Id.* (quoting *Rigby v. Beech Aircraft Co.*, 548 F.2d 288, 293 (10th Cir.)). "The decision to exclude (or admit) evidence under this rule is within the sound discretion of the trial court, and will not be reversed absent a clear abuse of discretion." *K-B Trucking Co. v. Riss International Corp.*, 763 F.2d 1148, 1155 (10th Cir.) (emphasis added). See also *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835 (10th Cir.); *Weir v. Federal Ins. Co.*, 811 F.2d 1387, 1396 (10th Cir.); *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 165 (10th Cir.).

During the in limine hearing, AOSHPI informed the court that it would respond to the Meulis' evidence on the California issues with evidence of three significant differences between the problems encountered by the Harvestore silo in California in the 1960s and the experiences of the Meulis in Kansas in the 1980s. AOSHPI noted that the incidents in California had



taken place many years before the Meulis leased their silo and the product had undergone many design changes during those years, that the large farm demands placed on the product in California were far different from the demands placed on the product by the Meulis, and that the oxygen-free representations made by AOSHPI about the product in California differed significantly from the oxygen-limiting ones made to the Meulis. AOSHPI had withdrawn from the California market and settled the claims made against it there.

Based upon the offers of proof from both parties, and the evidence presented at trial up to that point (virtually the entire case of the Meulis), the trial court ruled that because of the danger of unfair prejudice to AOSHPI and the danger of confusing the issues to the jury, the California evidence was inadmissible. Each of these findings \*1153 is clearly within the zone of the trial court's discretion within Rule 403. The record demonstrates the time differential, the design changes and the different climatic conditions. Thus the trial court justly could well conclude that each of these dangers outweighed the probative value of the evidence.

[2] Under Fed.R.Civ.P. 61 and Fed.R.Evid. 103(a), this court will not set aside the verdict of a jury based on an error in the admission or exclusion of evidence unless the error prejudicially affects a substantial right of a party. See *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir.); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), cert. denied, 439 U.S. 862, 99 S.Ct. 183, 58 L.Ed.2d 171.

The Meulis presented evidence on each of the issues sought to be raised by the California evidence. On the issue of

whether the Harvestore was merchantable, the Meulis presented numerous witnesses, including experts, who testified that the Harvestore silo was the cause of reduced weight gain and disease among the Meulis' cattle. On the fraud claim, the Meulis introduced numerous internal research reports, correspondence, and internal memoranda, from both AOSHPI and its parent corporation, relating to the issue of whether AOSHPI had notice of defects in its product and failed to correct them. During the in limine hearing, the trial court noted that the Meulis had presented sufficient evidence to overcome AOSHPI's motion for a directed verdict on both the merchantability and fraud claims despite the exclusion of the California evidence.

The Meulis also claimed that the California evidence was needed to rebut perceptions of legitimacy and reliability that attach to large companies like AOSHPI. They claimed that the exclusion of this evidence left the jury with the impression that the Meulis were the only people challenging the reliability of the Harvestore and the honesty of AOSHPI. Again, the Meulis introduced a variety of evidence to rebut any preconceived perceptions by the jury regarding AOSHPI's reliability and legitimacy.

Because the Meulis were able to introduce probative evidence on each of the issues raised by the California evidence, and because the trial court was careful to preserve the Meulis' right to use the California evidence on cross-examination for rebuttal purposes (a right the Meulis never needed to use), we cannot say that the trial court's exclusion of this evidence prejudicially affected a substantial right of the Meulis. Thus, even if the trial court had abused its discretion in excluding the evidence, which it did not do, we could not under

Fed.R.Civ.P. 61 and Fed.R.Evid. 103(a) set aside the verdict of the jury in favor of AOSHPI. Beacham v. Lee-Norse, supra; Rasmussen Drilling, supra.

[3] The Meulis also appeal the trial court's dismissal of defendant Mid- America from the suit after the close of the Meulis' case, but it is clear from the record that the Meulis failed to properly object to the dismissal of either claim. This failure to object precludes us under these circumstances from considering this issue on appeal. Not only did the Meulis fail to object to the dismissal of Mid-America on the breach of warranty claim, they specifically assented to the dismissal.

At the end of the same hearing, the trial judge dismissed the case against Mid-America in its entirety. The trial judge did not offer a separate basis for the dismissal of the fraud claim against Mid-America. Nevertheless, the Meulis' counsel made no objection to the dismissal of the fraud claim, nor did he ask for a reconsideration of the dismissal of the breach of warranty claim. He did not request an explanation or clarification of the dismissal. The trial judge was very clear in ruling that the entire claim against Mid-America was being dismissed.

The judgment of the trial court is AFFIRMED.

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STATE OF MINNESOTA                      IN DISTRICT COURT  
COUNTY OF SCOTT                      FIRST JUDICIAL DISTRICT

File No. 84-06303

James Dubbe and  
Julie Dubbe,

Plaintiffs,

vs.

A.O. Smith Harvestore Products, Inc.,  
a Delaware corporation, Minnesota  
Valley Breeders Association, a  
Minnesota cooperative, d/b/a/ Valley  
Harvestore Systems,

Defendants.

SPECIAL VERDICT FORM

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We, the jury in the above-entitled caption, find as a special verdict the answers to the following questions submitted to us by the Court:

1. Did the defendant, A.O. Smith Harvestore Products, Inc., fraudulently misrepresent the feed storing capabilities of the Harvestore units to the plaintiffs?

Yes X No       

If your answer to question No. 1 is "no", you need not answer questions 2 and 3. If your answer to question No. 1 is "yes", then answer questions 2 and 3.

2. Did plaintiff James Dubbe reasonably rely upon the fraudulent misrepresentations?

Yes        No X

3. Was the misrepresentation by defendant A.O. Smith Harvestore Products, Inc., a direct cause of damage to the plaintiffs?

Yes        No X

4. Did the defendant Minnesota Valley Breeders Association fraudulently misrepresent the feed storing capabilities of the Harvestore units to the plaintiffs?

Yes X No       

If your answer to question No. 4 is "no", you need not answer questions 5 and 6. If your answer to question No. 4 is "yes", then answer questions 5 and 6.

5. Did plaintiff James Dubbe reasonably rely upon the fraudulent misrepresentations?

Yes X No       

6. Was the misrepresentation by defendant Minnesota Valley Breeders Association a direct cause of damage to the plaintiffs?

Yes        No X

7. Did the defendant, A. O. Smith Harvestore Products, Inc., violate the provisions of the False Statement and Advertisement Act as set forth in Minnesota Statutes, Sec. 325F.67?

Yes X No       

8. If your answer to question No. 7 is "no", then do not answer this question. If your answer to question No. 7 is "yes", then answer the following question:

Was such a violation a direct cause of damage to plaintiffs?

Yes        No X

9. Answer the following question bearing up damages regardless of the answers you have given to other questions. Your verdict is not complete unless you have answered this question.



What sum of money will fairly compensate plaintiffs for damages sustained as a result of the defendants' false misrepresentations?

a.	Silo value loss	\$ 50,000
b.	Lost milk production	\$ 14,200
c.	Death of cows	\$ 0
d.	Decrease in value of cows	\$ 0
e.	Lost calves	\$ 0
f.	Veterinarian services	\$ 0
g.	Purchase of feeds and feed supplements	\$ 10,000
h.	Discarded feed	\$ 0

Dated at Shakopee, Minnesota, this \_\_\_\_ day of February, 1986, at \_\_\_\_ o'clock \_\_.m.

Signed: \_\_\_\_\_  
Foreperson

Concurring jurors sign below only if there is a five sixths verdict.

(Signatures Omitted in Printing)

Dated at Shakopee, Minnesota, this 21 day of February, 1986, at 3:12 o'clock p.m.

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(Cite as: 399 N.W.2d 644)

James DUBBE, et al., Appellants,  
v.  
A.O. SMITH HARVESTORE PRODUCTS, INC.,  
Minnesota Valley Breeders Association,  
d.b.a. Valley Harvestore Systems, Respondents.

No. C0-86-1016.

Court of Appeals of Minnesota.

Jan. 27, 1987.

Review Denied March 13, 1987.

Buyers of silos brought action against manufacturer and dealer alleging breach of warranties and misrepresentation. The District Court, Scott County, Thomas R. Howe, J., dismissed breach of warranty claims and entered judgment in favor of defendants on misrepresentation claim, and buyers appealed. The Court of Appeals, Sedgwick, J., held that: (1) disclaimer of warranties clause in purchase agreements was valid, and (2) trial court's harmonization of jury's seemingly contradictory answers, finding that misrepresentations were not direct cause of damages but answering damages question, by failing to award damages was reasonable and within the court's discretion.

Affirmed.

[1] SALES k267  
343k267

Disclaimer of warranties clause in agreement for purchase of silo was valid where it contained a capitalized, large print disclaimer identified as such, and merchantability was mentioned in the first sentence of the disclaimer. M.S.A. § 336.2-316.

[2] SALES k267  
343k267

Disclaimer of warranties clause in contract for sale of silo was not invalid on theory that it was unconscionable and constituted a contract of adhesion, where buyer, a farmer, had prior experience in commercial dealings.

[3] TRIAL k358  
388k358

Trial court possesses broad discretion in attempting to harmonize inconsistent answers of jury.

[4] SALES k422  
343k422

Harmonization, by failing to award damages, of jury's seemingly contradictory answers, finding that misrepresentations by manufacturer and dealer were not direct cause of buyer's damages but also answering damages question was a total figure of \$74,200, was reasonable and within the court's discretion.

\*645 Syllabus by the Court

1. The trial court did not err in dismissing the breach of warranty claims when the disclaimer in the purchase

agreement was conspicuous, satisfied the requirements of the U.C.C. (Minn.Stat. § 336.2-316), and was signed by appellant who read, or had opportunity to read, the agreement.

2. The trial court did not abuse its discretion in harmonizing the jury's inconsistent answers on the special verdict form when the jury ascertained partial damages even though they found no direct causal link between one defendant's misrepresentations and appellants' damages.

Ronald H. Schneider, Schneider & Kallestad, Willmar, John L. Neveaux, Jr., Wayzata, Paul Roland Rambow, Minnetonka, for appellants.

Frederick W. Morris, Best & Flanagan, Minneapolis, for respondent A.O. Smith Harvestore Products, Inc.

J.P. Dosland, Dosland, Dosland & Nordhougen, Moorhead, for respondent Minnesota Valley Breeders Association, d.b.a. Valley Harvestore Systems.

Considered and decided by FORSBERG, P.J., and SEDGWICK and HUSPENI, JJ., with oral argument waived.

#### OPINION

SEDGWICK, Judge.

The Dubbes appeal from a judgment in favor of A.O. Smith Harvestore Products, Inc. (Harvestore), the manufacturer, and Minnesota Valley Breeders Association (MVBA), the dealer, of "Harvestore" silos. The jury found that both respondents misrepresented their product, but that the misrepresentations

were not a direct cause of appellants' damages. The action was based on the failure of two Harvestore storage units to operate as advertised, as well as on the resulting damage to appellants' dairy operation. Partial summary judgment was granted on the negligence and strict product liability claims. Prior to trial, the court dismissed the breach of warranty claims. The Dubbes allege that the breach of warranty claims should not \*646 have been dismissed and that the trial court's failure to award damages was not consistent with the jury's special verdict. We affirm.

### FACTS

In 1981 James Dubbe purchased his father's 160-acre dairy farm. The barn, milking facilities, and feed storage capacity were expanded in 1981. In July 1981 Dubbe purchased a Harvestore silo and unloader for \$24,800 and in October 1981 a hay silo and unloader for \$64,800. Both purchases were made through the Minnesota Valley Breeders Association, a local cooperative.

Harvestore advertised that their structures and storage methods limited oxygen contact with feed, resulting in higher quality feed, healthier animals and cost-savings. Appellant claims that use of the Harvestore units, costing nearly triple the price of conventional storage, resulted in moldy and heat-damaged feed which adversely affected his herd's health and milk production. Appellant alleges Harvestore technology actually enhances oxygen contact and is inferior to common concrete silos.

Appellant presented expert testimony that the breather bags, the heart of Harvestore's oxygen limiting technology, were

faulty in that they, in conjunction with the unloader, actually pumped oxygen into the silos. Harvestore's testimony was that their methods were "state of the art" and did limit oxygen contact with the feed. Appellant testified to problems with herd health and milk production and that the herd's decline coincided with Harvestore's arrival.

Harvestore blamed the herd's milk production decline on Dubbe's inexperience and inability to effectively manage a large herd. The parties disputed whether the silage was stored at the proper moisture levels for effective utilization of Harvestore technology.

The jury returned a special verdict which found that Harvestore and MVBA did "fraudulently misrepresent the feed storage capabilities of the Harvestore units," but did not find the misrepresentation to be a direct cause of Dubbes' harm.

### ISSUES

1. Did the trial court err in dismissing the Dubbes' claims for breach of express and implied warranties?
2. Was the special verdict inconsistent with the trial court's judgment?

### ANALYSIS

The trial court dismissed appellants' breach of warranty claims prior to trial. It is clear from the record that the trial court considered matters outside the pleadings, i.e., the bill of sale and deposition of James Dubbe. The motion to dismiss was



therefore converted into a motion for summary judgment. *McAllister v. Independent School District No. 306*, 276 Minn. 549, 551, 149 N.W.2d 81, 83 (1967). Accordingly, we will view the evidence in the most favorable light for the appellant. *Carney v. Central Life Assurance Co.*, 366 N.W.2d 351, 353 (Minn.Ct.App.1985). In evaluating summary judgment on the breach of warranty claims, we must determine:

- (1) whether there are any genuine issues of material fact and
- (2) whether the trial court erred in its application of the law. *Greyhound Lines, Inc. v. First State Bank*, 366 N.W.2d 354, 356 (Minn.Ct.App.1985), pet. for rev. denied (June 27, 1985) (quoting *Betlach v. Wayzata Condominium*, 281 N.W.2d 328, 330 (Minn.1979)).

[1] This case involves a sale of goods; consequently, the Uniform Commercial Code, as enacted into Minnesota law, must be applied. Minn.Stat. § 336.2-316 (1984) covers the exclusion or modification of warranties. Subsection (2) sets out the requirements for a valid disclaimer.

Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion \*647 must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof." (Emphasis added.)

The Harvestore purchase agreements were similar. The front of the agreement was simply a bill of sale with space for the order to be listed. The back carried the terms of the sale. One

provision was listed as the "SECOND DISCLAIMER" which read:

NO OTHER WARRANTY, EITHER EXPRESS OR IMPLIED AND INCLUDING A WARRANTY OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE HAS BEEN OR WILL BE MADE BY OR IN BEHALF OF THE MANUFACTURER OR THE SELLER OR BY OPERATION OF LAW WITH RESPECT TO THE EQUIPMENT AND ACCESSORIES OR THEIR INSTALLATION, USE, OPERATION, REPLACEMENT OR REPAIR. NEITHER THE MANUFACTURER NOR THE SELLER SHALL BE LIABLE BY VIRTUE OF THIS WARRANTY, OR OTHERWISE, FOR ANY SPECIAL OR CONSEQUENTIAL LOSS OR DAMAGE (INCLUDING BUT NOT LIMITED TO THOSE RESULTING FROM THE CONDITION OR QUALITY OF ANY CROP OR MATERIAL STORED IN THE STRUCTURE) RESULTING FROM THE USE OR LOSS OF THE USE OF EQUIPMENT OR ACCESSORIES. THE MANUFACTURER MAKES NO WARRANTY WITH RESPECT TO THE ERECTION OR INSTALLATION OF THE EQUIPMENT, ACCESSORIES, OR RELATED EQUIPMENT BY THE HARVESTORE DEALER, WHO IS AN INDEPENDENT CONTRACTOR, OR BY ANY OTHER INDEPENDENT CONTRACTOR, IRRESPECTIVE OF ANY STATUTE. THE BUYER RECOGNIZES THAT THE EXPRESS WARRANTY SET FORTH ABOVE, IS THE EXCLUSIVE REMEDY TO WHICH HE IS ENTITLED AND HE WAIVES ALL OTHER REMEDIES, STATUTORY OR OTHERWISE. The "terms and conditions" section also contained a provision on "acknowledgment and reliance."

I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES, DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER. I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME.

Dubbe signed both agreements following this provision. He also initialed the signature box on the first agreement, but he did not initial the second agreement.

Exculpatory clauses, while not favored by the law, may be valid between private parties. See *Walton v. Fujita Tourist Enterprises Co.*, 380 N.W.2d 198, 201 (Minn.Ct.App.1986), pet. for rev. denied (Minn. March 21, 1986). Moreover,

[a] clause exonerating a party from liability will be strictly construed against the benefited party. If the clause is ambiguous in scope it will not be enforced.

*Id.*

The purchase agreement contains a capitalized, large print disclaimer, identified as such. Merchantability is mentioned in the very first sentence of the disclaimer. Since Dubbe signed the back sheet, and stated he read the section, or at least a part of it, he was aware of the section's implications. The disclaimer clause in the purchase agreement was valid.

[2] Appellant alleges the disclaimer clause is unconscionable and constitutes a contract of adhesion. Parties to such contracts are commonly of unequal strength and business knowledge. In this case, both parties are informed business entities. Dubbe cannot claim to have been victimized by

Harvestore and MVBA since, as a farmer, he had prior experience in commercial \*648 dealings. See *Nelson v. International Harvester Corp.*, 394 N.W.2d 578, 581 (Minn.Ct.App.1986), pet. for rev. denied (Minn. Dec. 12, 1986).

The purchase agreements, coupled with James Dubbe's statement that he read, initialed, and signed the agreements, remove any issue of material fact as to the disclaimers and the trial court did not err in ruling Minn.Stat. § 336.2- 316 was satisfied. The disclaimer was bargained for between commercial parties and is valid.

The special verdict form contained nine questions. The jury found that MVBA and Harvestore fraudulently misrepresented the feed storing capabilities of Harvestore units and that Dubbe reasonably relied on the misrepresentation. However, the jury also found that the misrepresentations were not the direct cause of Dubbe's damages. The jury was required, in order to complete the verdict form, to answer the following damage question: "What sum of money will fairly compensate plaintiffs for damages sustained as a result of the defendant's false representations?" (Emphasis added.) Appellant claims that since the jury answered the damage question with a total damage figure of \$74,200, they intended that Dubbe receive this amount, notwithstanding their answers that misrepresentations by MVBA and Harvestore were not a direct cause of Dubbe's damage.

[3][4] The trial court attempted to harmonize the inconsistent answers of the jury. The trial court possesses broad discretion in this area. *Strauss v. Waseca Village Bowl*, 378 N.W.2d 131, 133 (Minn.Ct.App.1985). The applicable standard is

"whether the answers can be reconciled in any reasonable manner consistent with its fair inferences." Id. In its denial of appellant's post-trial motions, the trial court said in its accompanying memorandum:

On the special verdict form the jury stated that defendants' actions did not directly cause plaintiff's injuries. The jury may have reasoned a superseding cause caused plaintiffs' injuries. The jury's determination of causation is not such that the record compels a conclusion, as a matter of law, that defendants' conduct was the direct cause of plaintiffs' injuries.

Also, since the verdict form required damages to be ascertained even if direct cause was not attributed to the misrepresentations, the jury may have answered the question because they felt they had to do so. The trial court's harmonization of the jury's seemingly contradictory answers appear to be reasonable and within its discretion.

## DECISION

The trial court did not err in dismissing the breach of warranty claims since the disclaimer complied with the U.C.C. requirements and was included in a signed purchase agreement. The harmonization of the jury's inconsistent answers on the special verdict form was reasonable and did not constitute an abuse of discretion.

Affirmed.

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BROOKS FARMS, a Tennessee  
partnership,

Defendants,  
and

GEORGE C. BROOKS, SR. GEORGE  
C. BROOKS, JR., and CARL LEE  
BROOKS, d/b/a BROOKS FARMS, a  
Tennessee partnership,

Third-Party Plaintiffs-  
Appellees-Cross Appellants

v.

A.O. SMITH CORPORATION

Third-Party Defendant-  
Cross-Appellee

and

A.O. SMITH HARVESTORE PRODUCTS,  
INC., HERMITAGE HARVESTORE  
SYSTEM, INC., and FRAN OSBORNE,

Third-Party Defendants-  
Appellants.

OPINION FILED: January 31, 1990

WILLIAM H. INMAN, SPECIAL JUDGE

App. No. 89-194-II

Maury County Circuit  
The Honorable  
William B. Cain, Judge

CONCUR:

HENRY F. TODD, PRESIDING JUDGE  
BEN H. CANTRELL, JUDGE

## OPINION

### I

Following a protracted trial<sup>1</sup> a jury awarded substantial compensatory and punitive damages to Brooks, dairy operators, against A. O. Smith Harvestore Products, Inc. (AOSHPI), Hermitage Harvestore Systems, Inc. ("Hermitage"), and Frank Osborne, arising out of the manufacture and sale of structures intended for the storage of cattle feed,<sup>2</sup> the putrefaction of which, according to the jury, resulted in decreased milk production and related, consequential damages.

Our consideration of the issues presented for review is governed by Rule 13, Rules of Appellate Procedures. We are not at liberty to weigh the evidence, but are limited to (1) a determination of whether there was presented material evidence to support the verdict, making the strongest legitimate view of all the evidence favorable to it, and discarding the contrary evidence, Pullins v. Fentress County

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<sup>1</sup>Thirteen weeks

<sup>2</sup>This litigation is somewhat complex, as one might assume from the participation of so many lawyers. It began as a simple action by the First National Bank of Louisville to recover the balance owing to it by Brooks for the lease/purchase financing the Harvestore system. A consent judgment was entered in favor of the bank.

Gen. Hosp., 594 SW2d 663 (Tenn. 1979), and (2) whether the issues presented for review, if decided favorably to the appellants, require a reversal and remand.

## II.

This litigation arose out of the acquisition and use of Harvestore agricultural feed and storage structures by third-party plaintiffs, George C. Brooks, Sr., George C. Brooks, Jr., and Carl Lee Brooks, d/b/a Brooks Farms, a Tennessee general partnership (the "Brooks"), in their dairy farm operations in Maury County, Tennessee. The Harvestore structures were manufactured by AOSHPI, which sold the structures to an independent dealer, the third-party defendant Hermitage, who, in turn, sold the structures to plaintiff, First National Bank of Louisville (the "Bank"). The Brooks entered into lease agreements with the Bank for possession, use, and ultimate purchase of the Harvestore structures and also signed written purchase orders with Hermitage.

The Brooks defaulted on their lease payments and the Bank commenced this action to recover the balance due. The Brooks filed a Third-Party Complaint against AOSHPI, Hermitage, and Hermitage's sales agent Frank Osborne ("Osborne"), seeking damages for innocent misrepresentation, manufacture of a defective product, breach of express and implied warranties, negligent design and manufacture, and unfair and deceptive acts or practices. Similar claims were brought by the Bank against the third-party defendants. The essence of the Brooks' claims was that AOSHPI's representations in its advertising brochures and promotional films regarding the Harvestore system of agricultural feed storage were false and that they relied upon those

representations in acquiring the Harvestore structures. The Brooks also sued AOSHPI's parent corporation, A. O. Smith Corporation ("Smith") on theories that it was directly liable for exercising dominion and control over AOSHPI or, alternatively, that it engaged in a civil conspiracy with AOSHPI, Hermitage and Osborne,<sup>3</sup> against Brooks.

AOSHPI denied the allegations of the Third-Party Complaint, and affirmatively asserted that the Brooks' alleged difficulties with the Harvestore structure were caused by their misuse and/or mismanagement of the equipment and whose poor performance in their dairy operations was allegedly due to a multitude of problems not related to the Harvestore structures. AOSHPI also contended that the Brooks' Third-Party Complaint was barred (1) by their contractual acknowledgment that they did not rely upon any representations and (2) by the statute of limitations.

## III.

Trial commenced on April 5, 1988. The trial issues were (1) the Bank's action against Brooks Farms, (2) the Brooks' allegations of innocent misrepresentation, negligent misrepresentation and fraudulent misrepresentation against AOSHPI, Hermitage and Osborne, (3) the Brooks' allegations against Smith of direct liability and their claim that the

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<sup>3</sup>The Brooks proceeded at trial against Smith on the theories of piercing the corporate veil and direct liability for exercising dominion and control of AOSHPI. A directed verdict was entered in favor of Smith on the direct liability theory and the jury returned a verdict in favor of Smith on the piercing of the corporate veil issue.

corporate veil should be pierced, and (4) the Bank's allegations against AOSHPI, Hermitage and Osborne of innocent misrepresentation, negligent misrepresentation, fraudulent misrepresentation and breach of warranty. A stipulated judgment was entered in favor of the Bank and against Brooks Farms. Directed verdicts in all of the Bank's claims against the third-party defendants were entered in their favor and against the Bank. A directed verdict was entered in favor of Smith as to the Brooks' claims of direct liability. The Brooks voluntarily dismissed their allegation of negligent misrepresentation against AOSHPI, Hermitage and Osborne.

On June 23, 1988, the jury returned a verdict in favor of the Brooks and against AOSHPI, finding innocent misrepresentation under proposed Section 552(D) of the Restatement (Second) of Torts, and intentional fraud, and against Hermitage and Osborne under proposed Section 552(D), and awarded compensatory damages in the amount of \$1,171,000.00. The jury also found against AOSHPI for intentional misrepresentation and assessed punitive damages in the amount of \$466,465.00. A verdict in favor of Smith on the issue of whether the corporate veil should be pierced was returned. Judgment was entered accordingly on July 29, 1988.

#### IV.

AOSHPI is a Delaware corporation with its principal place of business in Illinois, where it is engaged in the business of manufacturing agricultural equipment, including Harvestore structures. It is a wholly-owned subsidiary of A. O. Smith Corporation, a publicly-held company whose stock is traded on the American Stock Exchange. It owns several domestic

subsidiaries, numerous foreign subsidiaries, and has three major divisions which are engaged in a wide range of businesses.

The Harvestores are known as oxygen-limiting structures because they are not open at the top. The steel structures are glass-lined to resist acid and are coated with a sealer to stop air flow through the tank. These structures can be sealed between feedings and fillings so that, except under limited conditions, air does not enter and come in contact with the feed.

The Harvestore resembles a traditional farm silo. In 1980, it was manufactured and sold by AOSHPI, which, as stated, was a subsidiary of A. O. Smith Corporation, the marketer of the Harvestore. When AOSHPI was incorporated, Smith retained a royalty-free license for non-agricultural applications developed by AOSHPI from the technology related to the Harvestore or from technology developed by AOSHPI. As stated, the Harvestore was represented as being an "oxygen-limiting" feed storage structure that protected the stored feed from exposure to oxygen. Several types of advertising materials were utilized in selling the Harvestore structure to the Brooks. In addition to brochures furnished by Osborne describing the structure itself, there was a video tape presentation, "Research Bulletins," and a hardcover book titled The Winning System, all of which represented that the Harvestore patented breather bag system protected stored feed from oxidizing by preventing air from reaching the stored feed mass. Among the specific representations contained in the advertising were the following:



"1. The structure is as sealed a unit as can be practically assembled and operated. Air is not a substantial problem.

2. The tightly closed loading hatch and the bottom unloading system are designed to exclude air. The plastic "breather bags" control the air which enters and leaves the structure with changes in the atmosphere pressure and temperature thus avoiding unnecessary contact by air with the crop.

3. A. O. Smith engineers solved the problem of permitting the Harvestore structure to breath without letting air contact the stored feed by introducing balloon-like bags into the top of the structure. The air sucked into the Harvestore is contained in the bags so it does not come into contact with the feed.

4. The glass-fused-to-steel sheets are impervious to air. Each joint is coated with sealer, overlapped, firmly bolted and tested for air leaks."

#### V.

The thrust of the representation, as we gather, is that the Harvestore structures had the capability of storing feed without risk of damages from oxygen and was superior to other means of feed storage because after the oxygen entering the structure from the filling operation is exhausted, oxygen can no longer come into contact with the feed. As the trial judge observed:

All of these promotional documents submitted to the Brooks prior to the purchase of the Harvestores contained the clear representation that the only time oxygen could ever come into contact with the stored feed was during the initial loading process and that such small amounts of oxygen would be consumed within a matter of hours and that thereafter no oxygen could come into contact with the feed. These representations are plainly false. Aside from the fact that the Brooks would be presumed to rely upon these representations, there was adequate testimony of such reliance by George Brooks, Jr. and Carl Brooks. Reliance was thus a question of fact for the jury.

James Schaap, AOSHPI vice president of marketing, testified that AOSHPI had known about the problem of air entering the structure during feeding and through the relief valve since the Harvestore's inception, but was unable to determine its precise quantity. He further testified that if the representation was made in the Harvestore literature that the breather system prevents oxygen from coming into contact with the stored feed, such representation would be false. William Wallace, AOSHPI director of product engineering, agreed with Mr. Schaap regarding AOSHPI's lack of knowledge about the amount of air getting into the Harvestore and agreed that the representation that the breather system prevents oxygen from coming into contact with the feed is false.

Documents prepared by the Smith engineering department established that the Harvestore did not operate as represented, in that there are numerous avenues by which air can enter the structure. One of the principal avenues for air to

enter the structure is through the pressure relief valve. If the breather bags cannot hold enough air to compensate for pressure changes inside the structure caused by temperature swings, the pressure relief valve admits air into the structure. AOSHPI research documents indicate that temperature swings inside the structure of 50 degrees are common and that a ten percent breather bag capacity representing a ratio between the cubic space contained in the bag and the cubic space contained in the structure (as a whole) would be required to compensate for the pressure changes associated with such temperature swings.

According to a 1968 Smith research document, air also enters the structure through the unloading process which literally "pumps" air into the structure. This problem had still not been solved ten years later, and was the subject of a study in 1982. Among the named recipients of a 1982 study report was Donald Dunaway, then President of AOSHPI and a Smith officer.

AOSHPI represented that the Harvestore's fused glass and steel construction is impermeable to air. Smith research indicated that air entering through leaks in the structure is also a problem.

There was evidence that the Harvestore was sold by AOSHPI, under the management of Smith officers, upon the representation that its "patented breather bag system" protected the feed from the access of oxygen even though Smith knew air was getting into the structure.

## VI.

The Brooks owned and operated one of the largest dairy farms in Tennessee, known as Brooks Farms, which was founded by George Brooks, Sr. who later made two of his sons, George Brooks, Jr. and Carl Brooks, his full partners. Between them they had at least 67 years of dairy farm experience in 1980. George Brooks, Jr. was in charge of the milking herd, dry cow, heifer and calf program at Brooks Farms. Carl Brooks was in charge of the cropping program and maintains the equipment. George Brooks, Sr.'s wife, Mrs. Frances Brooks, maintained the books and records and acted as secretary of the partnership.

In February, 1980, shortly after the Brooks began the operation of their new dairy, Frank Osborne, a sales representative of Hermitage, called on them. He provided them with AOSHPI's films and literature regarding the Harvestore system. After reviewing the materials for several months and visiting other dairies in the area where Harvestore structures were in use, the Brooks informed Osborne of their decision to acquire four Harvestore structures in May, 1980. They had no direct contact with AOSHPI, and had no communication with any sales representative except Osborne. The only written AOSHPI communications the Brooks received were the film and literature provided by Osborne.

The Brooks signed five purchase orders for the structures, each of which included the following terms and provisions:

"10. The Seller hereunder is an independent contractor none of whose representations are binding on the Manufacturer [AOSHPI].

\* \* \*

4. Preamble - Buyer understands the conditions of use of the products and is not relying on the skill or judgment of the Manufacturer or Seller in selecting them because Buyer acknowledges that farming and livestock feeding results are very much the product of individual effort combined with various climatic, soil, water, growing and feeding conditions which are beyond the control of the Manufacturer and Seller. Buyer recognizes that any advertisements, brochures, and other written statements which he may have read, including any farm profit plan which may have been shown to him, as well as any oral statement which may have been made to him, concerning the potential of the Harvestore and or Slurrystore units and allied machinery and equipment, are not guarantees and he had not relied upon them as such because the products will be under Buyer's exclusive management and control . . . .

\* \* \*

#### ACKNOWLEDGMENT AND RELIANCE

I HAVE READ AND UNDERSTOOD THE TERMS AND CONDITIONS OF THIS PURCHASE ORDER INCLUDING THE WARRANTIES, DISCLAIMERS AND TERMS AND CONDITIONS HEREIN GIVEN TO ME, EITHER BY THE MANUFACTURER OR THE SELLER,

I RELY ON NO OTHER PROMISES OR CONDITIONS AND REGARD THAT AS REASONABLE BECAUSE THESE ARE FULLY ACCEPTABLE TO ME."

The first Harvestore structure was constructed at Brooks Farms by Hermitage on or about October 2, 1980, with financing being arranged by Osborne with the Bank on behalf of the Brooks. The fourth and final Harvestore structure was constructed by Hermitage in early December, 1980.

The Brooks claimed that the manner in which the structures were designed and engineered damaged rather than preserved feed and resulted in poor milk production by their dairy cattle. The Brooks alleged that their dairy cattle suffered nutritionally from eating feed stored in the structures, that they became sick and their milk production declined, which ultimately resulted in the loss of their dairy operation.

At trial, both sides introduced expert testimony to support their respective positions regarding the performance and utility of the Harvestore structures. On the one hand, the Brooks' experts testified that the Harvestore structures did not store feed properly and adversely affected the nutritional value of the feed which caused the health of the Brooks' dairy cattle to deteriorate and decreased their milk production. AOSHPI's experts, on the other hand, testified that when operated correctly the Harvestore structures function properly and, indeed, reduce the amount of feed losses far better than concrete stave silos or other conventional feed bunkers.

In addition, there was evidence that the Harvestore structures were not responsible for the poor health of the



Brooks' dairy herd or the economic results of their dairy business but, rather, they were caused by a multitude of unrelated problems, superimposed upon the Brooks' own farm management practices and their misuse of the structures. The jury resolved these disputed factual issues as heretofore stated. The trial judge approved the verdict and this appeal resulted.

## VII.

AOSHPI presents the following issues for review:

1. Whether summary judgment should have been entered in favor of a manufacturer on the purchasers' claims of misrepresentation when it was demonstrated that the purchasers had expressly acknowledged in writing that they did not rely on any representations other than those contained in the purchase orders.
2. Whether summary judgment should have been entered in favor of a manufacturer on the purchasers' claims of misrepresentation when it was demonstrated that the purchasers discovered or should have discovered the occasion, manner, and means which produced their injury more than three years prior to the filing of their cause of action.
3. Whether proposed Section 552(D) of the Restatement (Second) of Torts should be recognized as a valid cause of action in Tennessee.
4. Whether the trial court erred by excluding the testimony of the manufacturer's witnesses as evidence that the manufacturer's representations regarding the product were accurate and that any misrepresentations regarding the

product were accurate and that any misrepresentations were not intentional.

5. Whether the trial court erred by admitting a summary document when it was demonstrated that the summary was contradicted by prior sworn testimony and that it lacked a proper foundation.

6. Whether the trial court erred by admitting the testimony of the purchasers' damages expert, when such testimony was speculative, uncertain and not based on loss of net profit.

7. Whether the trial court erred in giving and refusing to give certain jury instructions.

8. Whether the punitive damage award violates the right to due process under the United States and Tennessee Constitutions.

## VIII.

We do not review the denial of summary judgment to a defendant except upon interlocutory appeal, since the grounds asserted by the defendant in his motion should be reasserted upon conclusion of the trial by motion for a directed verdict, see Williamson County Broadcasting Co. v. Williamson County Board of Education, 549 SW2d (Tenn. 1977) the denial of which is reviewable. We assume the first and second issues are directed to the action of the trial court in denying a directed verdict on the grounds asserted.

The purchase order signed by Brooks acknowledged that no reliance is placed on the "skill and judgment of the Manufacturer or Seller," and that Brooks has not relied upon the advertisements, brochures, oral or written statements of the Seller or Manufacturer. This defense has paramount significance, and we conclude that from all of the circumstances, including the marketing techniques employed, the Brooks were entitled to go to the jury on the issue.

They were inundated with sales materials which extolled the virtues of the Harvestore system. One of the principals, Osborne, admitted that these materials were intended to encourage reliance thereon by a purchaser. The evidence, except for the quoted disclaimer, is well-nigh conclusive that Brooks did indeed rely upon the host of sophisticated, impressive materials showered upon them. If reliance was not intended, the alternative postulate is that they were intended by the purveyors to lead a consumer into a sense of false security. These materials go far beyond the puffing of a product.

Material representations of the character and quality of the product contained in the printed advertising and promotional materials and films are a proper basis of a claim of fraudulent misrepresentation. Cooper Paintings and Coatings, Inc. v. SCM Corp., 457 SW2d 864 (Tenn. App. 1980) (roofing material); Ford Motor Co. v. Taylor, 446 SW2d 521 (Tenn. App. 1969) (farm tractor); Ford Motor Co. v. Lonon, 398 SW2d 240 (Tenn. 1966) (farm tractor); Mash, Inc. v. Fiat Allis Constr. Machinery, Inc., 461 F. Supp. 79, 80-81 (E.D. Tenn. 1978) (mining machine); Vicon, Inc. v. CMI Corp., 657 F.2d 768, 773-774 (5th Cir. 1981) (asphalt plant). The fact misrepresented must be a material one of importance

to the normal purchaser, by which the buyer may justifiably be expected to be influenced in buying the chattel. Williams v. Van Hersh, 573 SW2d 373, 376 (Tenn. App. 1978); Ford Motor Co. v. Taylor, *supra*, 446 SW2d at p. 526. Whether such representations are material is a question of fact for the jury. Cooper Paintings & Coating, Inc. v. SCM Corp., *supra*, 457 SW2d at p. 668; Ford Motor Co. v. Lonon, *supra*, 398 SW2d at p. 250.

The appellees argue that the law in Tennessee does not permit disclaimer of liability for fraud, and we agree. Fraud, when fully made to appear, vitiates all contracts into which it enters. Metropolitan Life Ins. Co. v. Hedgepath, 185 SW2d 906, 907 (Tenn. 1945); New York Life Ins. Co. v. Nashville Trust Co., 292 SW2d 749, 754 (Tenn. 1956); 17 Am. Jr. 2d, CONTRACTS, Section 191. Robinson v. Tate, 236 SW2d 445, (Tenn. App. 1950).

Regardless of the language employed, disclaimers of liability for fraudulent acts will not be endorsed because they are in violation of important public policy. We think the following quote essentially explains:

"Similarly, the law does not permit a covenant of immunity to be drawn that will protect a person against his own fraud; such a covenant is unenforceable because of public policy. A party to a contract cannot, by misrepresentation of a material fact, induce the other party to enter into the contract to his damage, and then protect himself from the legal effect of such misrepresentation by inserting a clause in the contract to the effect that he is not to be held liable for

the misrepresentation." 17 Am. Jur., CONTRACTS, Section 190."

We think the statements in Clements Auto Company v. Services Bureau Corp., 444 F.2d 169, 177-178 (8th Cir. 1971), cited and relied upon by the U. S. District Court of Tennessee in Mash, Inc., supra, 461 F. Supp. at p. 81 in holding that disclaimer of liability for tortious misrepresentation is ineffective, are meaningful.

"The law should not, and does not, permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable because of public policy."

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"Language is not strong enough to write such a contract. Fraud destroys all consent. It is the purpose of the law to shield only those whose armor embraces good faith."

That this is the public policy of Tennessee is further evidenced by the adoption by the Supreme court of Section 195 of Restatement of the Law 2d, CONTRACTS, which provides:

[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.

Adams v. Roark, 686 SW2d 73, 75 (Tenn. 1985); Houghland v. Security Alarms & Services, 755 SW2d 769 (Tenn. 1988).

Moreover, the public policy is further emphasized by TCA 47-50-112 which reads, in part, "nothing herein shall limit the right of any party to contest the agreement on the basis it was procured by fraud." Southern States Development Co., Inc. v. Robinson, 494 SW2d 777, 781 (Tenn. App. 1972) holds that the law will take whatever means are necessary to prevent fraud:

"This is so because the mind of man is infinite in its contrivances. No matter what laws are written for the purpose of preventing frauds, in time, man will discover some way to use the very law established to prevent frauds to protect one. Equity abhors fraud to such extent that new rules will be created or new exceptions to the rules will be announced, if there is no other way to prevent the reward of a fraud caused by a new and different scheme perpetrated for the same old end."

We accordingly find the first issue to be without merit.

#### VIII. (sic)

AOSHPI contends that TCA 18-5-105 prescribes a three years period within which Brooks is required to assert his claim, and that the complaint was not timely filed, according to the "overwhelming evidence." Much of the argument on the point overlooks the fact that this is a jury-tried case, and that the factual issues inherent in the issue of the statute of limitations was for determination by the jury.

There was evidence presented that it was not until 1983 that the Brooks either knew or in the exercise of



reasonable care should have discovered that the source of the problem was the Harvestore structures. Similarly to the factual situation in Foster v. Harris, 633 SW2d 304 (Tenn. 1982), the Brooks knew that they were having problems with milk production and animal health but testified that they did not know and could have known by the exercise of reasonable care and diligence, that the source of the problems was a tortious act, and that those problems were caused by the Harvestore structures. The Brooks consulted veterinarians and other experts in the dairy field to determine the source of the their problems. They had numerous contacts with representatives of and experts referred to them by the appellants. Significantly, each contact with the appellants or with experts referred by them indicated that the resource of the problem was something other than the structures in question, and there was testimony that Osborne repeatedly assured the Brooks that the problems were caused by reasons other than the Harvestore structures.

Expert testimony indicated that the Brooks exercised reasonable care and diligence in attempting to determine the source of their problems. As held in Hathaway v. Middle Tennessee Anesthesiology, 723 SW2d 355 (Ct. App. 1987) whether they exercised reasonable and diligent care in discovering this is a question for the jury. Moreover, there was evidence offered from which the jury could have found that the appellants' actions were designed to prevent the Brooks from discovering their cause of action. Fraudulent concealment tolls the statute of limitations. Cooper v. Cordova Sand and Gravel Co., Inc., 485 SW 2d 261 (Tenn. App. 1971); Ray v. Scheibert, 450 SW 2d 578 (Tenn. 1969); Howell v. Davis, 306 SW 2d 9 (Tenn. App. 1957); Union Carbide & Carbon Corp. v. Stephen, 237 F2d 329, 233 (6th

Cir. 1956). We accordingly find the second issue to be without merit.

## IX.

AOSHPI argues that the 552(D) action should not have gone to the jury, because it is essentially contractual in nature and there was no privity between Brooks and AOSHPI, against whom the claim of intentional misrepresentation was submitted to the jury.

In Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 SW 2d 240 (1966), the Supreme Court of Tennessee approved the proposed Section 552(D) of the Restatement of Torts (Second)<sup>4</sup> prior to the determination of whether it would be formally adopted in the Restatement, and it has not been adopted.

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<sup>4</sup>Proposed Section 552(D) permits recovery of pecuniary damages by the purchaser for the seller's innocent misrepresentations as follows:

One engaged in the business of selling chattel who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for pecuniary loss caused to another by his purchase of the chattel in justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

After Lonon was decided, the Advisory Committee gave special consideration to proposed Section 552(D) and decided that any liability under it was essentially contractual rather than tortious in nature. It was suggested that the sole comment under proposed Section 552(d) should state, "For details of the application of the principle of this Section, see the Uniform Commercial Code." See Restatement (Second) of Torts, Supplement, at 296. When this recommendation was reported to the Council, it voted to delete proposed Section 552(D) entirely, and apparently no other state has adopted or approved proposed Section 552 (D). But our Supreme Court, in Lonon, supra, approved 552(D) as applicable to tort actions and there the matter ends.

As stated, Section 552(D) specifically subjects sellers of chattels to liability for misrepresentation, and although it is a strict liability cause of action, we agree with Brooks that is not precluded by TCA 29-28-106(b), which provided:

(b) No product liability action is defined in section 29-28-106(b), when based on the doctrine of strict liability in tort shall be commenced or maintained against any seller of a product which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer unless said seller is also the manufacturer of said product or the manufacturer of the part thereof claimed to be defective, or unless the manufacturer of the product or part in question shall not be subject to service of process in the state of Tennessee or service cannot be secured by the long-term statute of Tennessee or unless such manufacturer has been judicially declared insolvent.

While none of the three threshold requirements for bringing in section precluded by TCA 29-28-106(b) against the seller is present in this case, we think the statute does not preclude all strict liability causes of action against a seller. TCA 29-28-106(b) only precludes causes of action which allege both (1) strict liability in tort and (2) "... which is alleged to contain or possess a defective condition unreasonably dangerous to the buyer, user or consumer ... "

Since adoption of Section 552(D) in Ford Motor Co. v. Lonon, supra, many courts have held that there may be liability for pecuniary or economic loss resulting from misrepresentations. Several such cases have specifically cited proposed section 552(D) as the basis for liability. Cooper Painting & Coatings, Inc. v. SCM Corporation, 457 SW2d 865, 867 Tenn. App. 1970); Benco Plastics, Inc. v. Westinghouse Electric Corporation, 387 F. Supp. 772, 784 (E.D. Tenn. 1974); Walker Truck Contractors, Inc. v. Crane Carrier Company, 405 F. Supp. 911, 917 (E.D. Tenn. 1975); Vicon, Inc. v. CMI Corporation, 857 F. 2d 748, 775 (5th Cir. 1981). Other cases have held that there is liability for pecuniary or economic loss resulting from misrepresentations based upon the rule of Ford Motor Co. v. Lonon, though not specifically citing section 552(D). Walker v. Decora, Inc., 471 SW2d 773, 782 (Tenn. App. 1971); Jasper Aviation, Inc. v. McCullum Aviation, Inc., 497 SW2d 240 242 (Tenn. 1972); American Building Companies v. White, 640 SW2d 569 (Tenn. App. 1982). We accordingly find the third issue to be without merit.



Issues four, five and six complain of the admission or exclusion of evidence.

AOSHPI proffered the testimony of satisfied users of Harvestore structures. Objections to the admissibility of this testimony were sustained, but as we read the record, appellants nevertheless successfully persevered in their effort to prove a number of satisfied users and we do not see how the "exclusion" of such testimony prejudiced them.

The admission of a document which summarized milk production for seven years is assailed as misleading and unreliable, but the prerogative to agree or disagree was with the jury and in any event its admission rested within the sound discretion of the trial judge and we cannot find an abuse of his discretion. Emerson v. Gardner, 732 SW2d 613, (Ct. App. 1987). The same may be said of the contention that the testimony of the damages expert called by Brooks was too speculative and uncertain. We have examined this testimony closely and cannot say that the court abused his discretion in permitting the expert to testify. The testimony was within the gambit of the rules pronounced in American Builders v. DBH Attachments, 676 SW2d 553 (Ct. App. 1984).

We accordingly find these issues to be without merit.

#### XII. (sic)

AOSHPI tendered special jury instructions, which were refused, and insists that the instructions as given did not cover every issue of fact or theory supported by the evidence. We do not agree.

George Brooks, Sr., and his wife, Frances Brooks, did not testify, which impels AOSHPI to argue that the "failure to call a witness" charge should have been given. This charge is essentially boiler-plate, and may be found in Tennessee Pattern Jury Instructions 2.03. The principal reasons advanced are (1) because Brooks, Sr. signed the purchase order which contained the disclaimer of reliance, and (2) because he had knowledge of the date of the accrual of the cause of action.

So far as this record reveals, these prospective witnesses were equally available to the appellant. The Rules of Civil Procedure authorize the calling of an adverse witness, and provide ample protection to the party exercising the privilege. No longer does a party call a witness at his peril. Moreover, the discovery depositions of these witnesses were available to AOSHPI. Under these circumstances, and the cumulative effect of their testimony aside, we cannot find that the trial judge was in error in refusing the requested instruction. See, Baker v. Baker, 24 Tenn. App. 283 (1940).

#### XIII.

It is next contended that the jury should have been instructed on AOSHPI's theory of alternative causation, as follows:

If you find that it is equally probable that the injuries complained of by the Brooks partnership may have resulted from any of several causes, and the Third-Party Defendants or Defendants are responsible for only one of the causes, then any choice between them would be a matter of conjecture. No recovery can be permitted if the evidence leaves it to conjecture as to



which of several causes may have resulted in the injury where the Third-Party Defendants are liable for only one of them.

AOSHPI relies on Williams v. M.C. West Const. Co., 579 SW2d 883, (CT App. 1978) as authority for its insistence that the requested instruction should have been charged, since Tennessee law does not permit recovery if the "evidence leaves it to conjecture which of two probable causes resulted in the injury where the defendant was liable for only one of them". The operative word here is "conjecture", and under the evidence presented in this case, the jury was not required to indulge in speculation as to the cause of the disaster which befell the appellees. Campbell v. Campbell, 199 SW2d 951 (Ct. App. 1947) is authority for the dogma that because the injury possibly could be attributable to extraneous causes did not exonerate a defendant wherein the jury concluded that the breach of the duty charged was the cause of the injury. It is not required that the evidence must exclude the possibility that the injury resulted from a cause differing from that alleged. Standard Oil v. Roach, 94 SW2d 53 (Ct. App. 1936).

AOSHPI offered evidence in abundance that the troubles experienced by Brooks were caused by misfortunes wholly unrelated to the Harvestore structures. Conversely, Brooks offered much evidence that the Harvestores were the sole cause of their problems. We can only say, as we must, that it was within the peculiar province of the jury to decide the issue upon a preponderance of all the evidence which in no wise entailed speculation. Moreover, the jury was forcefully instructed that it could award damages only for those injuries which it found to have been proximately caused by the actions of the defendants. These issues are without merit.

#### XIV.

AOSHPI insists that its special request.

"No evidence has been presented which would permit you to conclude that Frank Osborne and/or Hermitage Harvestore Systems, Inc. ("Hermitage") were agents of A.O. Smith Harvestore Products, Inc. ("AOSHPI"). I therefore, charge you that you are not to consider oral representations made by Mr. Osborne and/or Hermitage in any way against AOSHPI. Similarly, you are not to consider against AOSHPI any written representation of Mr. Osborne and/or Hermitage unless they were prepared by AOSHPI."

should have been charged. We do not agree that the requested charge accurately reflects the law in Tennessee, or, even so, that it was relevant under all the evidence, because, much like the pattern in Cooper Paintings and Coatings, Inc. v. SCM Corp., 457 SW2d 864 (Ct. App. 19776), reasonable inferences to be derived concerning the authority of Osborne could justify the conclusion that for the purposes of this case he was a special agent of AOSHPI. In any event, the trial judge instructed the jury that

"Osborne was not the agent of AOSHPI, that each defendant was entitled to fair and separate consideration, that evidence should be considered against AOSHPI on the one hand and against Hermitage and Osborne on the other and that as to AOSHPI it should determine whether " 'the advertising for promotional literature of films' contained misrepresentations while instructing

separately as regards Hermitage and Osborne that it must determine if the 'advertising, promotional literature, film or oral or written statements' contain misrepresentations."

These instructions were sufficient.

#### XV.

AOSHPI next claims that the jury should not have been instructed that "a duty to disclose known facts arises where one party knows of material facts and also knows that such facts are neither known nor readily accessible to the other party." We are somewhat at a loss to understand this argument; the instruction reflects not only Tennessee law, but so far as we can determine, the law in all of the states. See, Belote v. Memphis Development Co., 346 SW2d --1. (Tenn. 1961). Its relevance to the case at hand seems apparent.

#### XVI.

Finally, AOSHPI contends that the punitive damages award is violative of due process.

It is fair to observe that no judge of this Court is enthusiastic about punitive damages. Whether, as stated by the United States Supreme Court in Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 57 U.S.LW 4985 (June 1989), due process acts as a check on unbridled jury discretion to award punitive damages has not been determined by the Supreme Court of Tennessee. We take note that guidelines for the award of such damages are

somewhat sparse, but the Supreme Court, in Coppinger Color Lab, Inc. v. Nison, 693, SW2d 72 (Tenn. 1986) held.

[S]uch an award will be set aside if it is grossly excessive or appears to be the result of passion, prejudice, improper sympathy, or for some other reason appears to constitute an injustice . . . The factors to be considered in assessing the award include the nature of the defendant's acts, the amount of compensatory damages awarded and the wealth of the particular defendant. The more reprehensible the act, the greater the appropriate award of punitive damages.

While AOSHPI offers persuasive reasons why the lack of plenary guidelines is offensive to the process requirements, we note that the compensatory damages award was \$1,171,000.00, and the punitive damages award was \$466,465.00. We cannot say, assuming the validity of the concept of punitive damages, that the facts of this case do not justify an award of such damages, or that the award is disproportionately excessive. Even the trial judge took the somewhat unusual step of filing a comprehensive opinion, overruling the motion for a new trial, in which he made reference, essentially, that any trier of fact would conclude that the fraud practiced on the plaintiffs was gross indeed. As we understand, it is not the amount of the punitive damages, but the concept, that is assailed; and as to this, we defer, as we must, to the Supreme Court, or to the Legislature. We do indulge the observation that unbridled jury discretion has never been fostered in Tennessee.



XVII.

The verdict against Hermitage Harvestore Systems and Frank Osborne on the strict liability issue, (Section 552(D) of the Second Restatement), was also approved by the trial judge. These appellants present for review the propriety of the submission of the case on the 552(D) theory, and we think the comments of the trial judge are especially apropos:

"These defendants first assert that the action at bar cannot lie because of the Tennessee Products Liability Act of 1978, codified as TCA 29-28-101 et seq. This statute, however, applied by its terms to "... all actions brought for or on account of personal injury, death or property damage caused by or resulting from ..." that which is defined as a "product" within the meaning of the statute (TCA 29-28-102(6)). While such statute would apply to claims under 402(a) and 402(b) of the Restatement as adopted in Ford v. Lonon because both of these sections dealing with "physical harm" necessarily mean "... personal injury, death or property damage ...". The basis, however, for liability of Hermitage Harvestore and its agent, Frank Osborne, is the adoption in Ford v. Lonon of the rule stated in Section 552(d) of the tentative draft of the Restatement holding a seller liable for "... pecuniary loss ..." caused by reliance upon misrepresentation of material facts by the seller. Ford Motor Co. v. Lonon, 498 SW2d 240, 246-247. Relying on the celebrated case of Selly v. White Motor Co., 45 CV. 17, 403 P.2d 145 (1965), the Supreme Court of Tennessee asserts:

"... While in a commercial loss case the strict tort liability developed in 2 Restatement (Second) Torts Section 402(a)(1965) cannot be imposed, a comparable liability without negligence can be imposed where the manufacturer has made representations that his product is free from defects in material and workmanship even though there is no privity of contract."

(Emphasis added.) 398 SW2d 240, at 250.

"It is of no consequence that the American Law Institute never actually adopted Section 552(d) of the tentative Restatement. The Supreme Court of Tennessee clearly did adopt it in Ford Motor Co. v. Lonon, and such holding has never been overruled, limited or restricted by subsequent appellate decisions in Tennessee.

The charge to the jury made it clear that the jury was required to consider the case against Hermitage Harvestore Systems, Inc. and its agent, Frank Osborne, separate and apart from the parallel case against A. A. Smith Harvestore Products, Inc. The jury was in deliberation in this case for nearly seven full days with both the verdict form and the charge of the law in the hands of the jury throughout such deliberations.

The Court is satisfied that the case against Hermitage Harvestore Systems, Inc. and its agent, Frank Osborne, was fairly tried under admissible



evidence and that the verdict of the jury is in conformity with the weight of the evidence."

We agree with these comments and conclusions.

#### XVIII.

These appellants contend the trial court should have charged the jury that the applicable statute of limitations began to run from the date of the distribution of the materials, rather than from the date of the discovery of the cause of action. They argue that because the jury found them innocent of fraud they "could not have concealed a misrepresentation" from the appellees, and hence the Teeters v. Curry rule, 518 SW2d 512 (Sup. Ct. 1974), is not applicable. We do not agree, for reasons heretofore expounded. The issue is not whether these appellants concealed salient facts, but whether the appellees in the exercise of proper judgment discovered or should have discovered the cause of their problems.

The remaining issues presented by Hermitage and Osborne are duplicative of those presented by AOSHPI and need not be further discussed.

We find all of the issues to be without merit and therefore affirm the judgment. In view of this, we pretermitt the issues propounded by the appellees.

The costs are assessed to the appellants.

/s/ William H. Inman  
William H. Inman,  
Special Judge

CONCUR:

/s/ Henry F. Todd  
Henry F. Todd, Presiding Judge

/s/ Ben H. Cantrell  
Ben H. Cantrell, Judge.

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